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No. 92-351-CFX
Status: GRANTED

Docketed:
August 26, 1992

Title: Leonard Heller, Secretary, Kentucky Cabinet for Human Resources, Petitioner
v.
Samuel Doe, by his mother and next friend, Mary Doe, et al.

Court: United States Court of Appeals for the Sixth Circuit

Counsel for petitioner: Moore,William K.

Counsel for respondent: Miller,Kelly A.

Entry	Date	Note	Proceedings and Orders
1	Aug 26 1992	G	Petition for writ of certiorari filed.
2	Sep 24 1992		Brief of respondents Samuel Doe, et al. in opposition filed.
3	Sep 30 1992		DISTRIBUTED. October 16, 1992
4	Oct 19 1992		Petition GRANTED. **
5	Dec 3 1992		Brief amici curiae of Concerned Families of Hazelwood Center, et al. filed.
6	Dec 3 1992		Brief amici curiae of New Jersey, et al. filed.
9	Dec 3 1992		Brief amici curiae of Voice of the Retarded, et al. filed.
7	Dec 7 1992		Joint appendix filed.
8	Dec 7 1992		Brief of petitioner Leonard E. Heller filed.
10	Dec 23 1992	D	Motion of Voice of the Retarded, et al. for leave to participate in oral argument as amici curiae and for divided argument filed.
12	Jan 4 1993		Order extending time to file brief of respondent on the merits until January 11, 1993.
14	Jan 8 1993		Brief amici curiae of American Association on Mental Retardation, et al. filed.
13	Jan 11 1993		Motion of Voice of the Retarded, et al. for leave to participate in oral argument as amici curiae and for divided argument DENIED.
15	Jan 11 1993		Brief amicus curiae of Mental Health Law Project filed.
16	Jan 11 1993		Brief amici curiae of Focus on Community Understanding and Services, et al. filed.
17	Jan 11 1993		Brief of respondents Samuel Doe, et al. filed.
18	Jan 29 1993		Record filed.
		*	Partial proceedings United States Court of Appeals for the Sixth Circuit.
20	Feb 4 1993		CIRCULATED.
21	Feb 5 1993		Record filed.
		*	Original proceedings U. S. District Court, Western District of Kentucky. (BOX)
24	Feb 23 1993	G	Motion of petitioner for leave to file a reply brief out-of-time filed.
19	Mar 3 1993		SET FOR ARGUMENT MONDAY, MARCH 22, 1993. (4TH CASE).
25	Mar 8 1993		Motion of petitioner for leave to file a reply brief out-of-time GRANTED.
26	Mar 22 1993		ARGUED.

EDITOR'S NOTE

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92-351

No. ________

Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

LEONARD E. HELLER, Secretary, KENTUCKY CABINET FOR HUMAN RESOURCES - - - - - - - - Petitioner

versus

SAMUEL DOE, by His Mother and Next Friend, MARY DOE, Et Al. - Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether sufficient differences exist between the mentally retarded and the mentally ill to permit a State to adopt involuntary hospitalization procedures permitting involuntary hospitalization of the mentally retarded based upon the "clear and convincing" standard of proof while requiring that involuntary hospitalization of the mentally ill be based upon the "beyond a reasonable doubt" standard of proof.

2. Whether sufficient differences exist between the mentally retarded and the mentally ill to permit a State to adopt procedures which permit the parents and legal guardians of mentally retarded persons to participate in involuntary admission proceedings for the mentally retarded as if parties thereto without adopting procedures for the parents and legal guardians of mentally ill persons to participate as parties in involuntary hospitalization proceedings for the mentally ill.

3. Whether involuntary hospitalization procedures which permit a mentally retarded person's parents or legal guardian to participate in the proceedings as though a party therein deprive the mentally retarded person of his right to Due Process of Law.

LIST OF PARTIES

The parties to the proceedings below consisted of:

a. Leonard E. Heller, Secretary of the Kentucky Cabinet for Human Resources and

b. Samuel Doe, by and through his mother and next friend, May Doe, on his own behalf and as the representative of a class consisting of all mentally retarded persons in the Commonwealth of Kentucky who are presently committed or who may in the future be subjected to being committed to a state hospital, institution or other mental retardation residential treatment involuntarily on the basis of their condition of mental retardation and who contend that said involuntary commitment violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution, 29 U.S.C. § 794, and KRS Chapters 202A, 202B, 210 and 31.

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No. ________

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

LEONARD E. HELLER, Secretary, KENTUCKY
CABINET FOR HUMAN Resources - - - - *Petitioner*

v.

Samuel Doe, by His Mother and Next Friend,
MARY DOE, Et Al. - - - - - - - *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Leonard E. Heller, Secretary of the Kentucky Cabinet for Human Resources, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-styled proceeding on June 1, 1992.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Sixth Circuit is reported at 965 F.2d 109 (6th Cir. 1992) and is reprinted in the Appendix hereto, page 1a, *infra*.

The Memorandum Opinion and Preliminary Injunction of the United States District Court for the Western District of Kentucky from which said appeal was taken is reported at 668 F.Supp. 597 (W.D. KY 1991) and is reprinted in the appendix hereto, page 8a, *infra*. Said Opinion was the fourth Opinion of the United States District Court in these proceedings.

The United States Court of Appeals for the Sixth Circuit had previously entered an Opinion in this matter that is reported *sub nom. Doe* v. *Austin* at 848 F.2d 1386 (6th Cir. 1988) and is reprinted in the Appendix hereto, page 19a, *infra*.

The third Opinion of the United States District Court for the Western District of Kentucky is reported *sub nom. Doe* v. *Austin* at 663 F.Supp. 597 (W.D. KY 1986) and is reprinted in the Appendix hereto, page 39a, *infra*.

The second Opinion of the United States District Court for the Western District of Kentucky is not reported. The decision is printed in the Appendix hereto, page 40a, *infra*.

The initial Opinion of the United States District Court for the Western District of Kentucky is not reported. The decision is printed in the Appendix hereto, page 49a, *infra*.

JURISDICTION

The Opinion of the United States Court of Appeals for the Sixth Circuit was entered on June 1, 1992. (App. p. 1a). The jurisdiction of this Court to review the Opinion of the Sixth Circuit is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 42 U.S.C. § 1983: Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State of Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

2. Amendment XIV, United States Constitution, Section 1: Citizenship; Due Process; Equal Protection.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner[1] is the chief executive and administrative officer of the Kentucky Cabinet for Human Resources

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[1] Harry J. Cowherd, appellant below, resigned from his position as Secretary of CHR effective December 29, 1991 and was succeeded in office by Leonard E. Heller. Pursuant to F.R.Civ.P. 25(d)(1) Leonard E. Heller has automatically been substituted as the interested party in this action.

(CHR). CHR is the administrative agency which operates Kentucky's programs for the mentally retarded, including the Commonwealth's intermediate care facilities (formerly called mental retardation residential treatment centers). At last count there were 769 residents in CHR's four intermediate care facilities for the mentally retarded. (Trial Record, hereafter R. 114, p. 1).

Respondent, Samuel Doe, is a severely retarded adult who was admitted to one of CHR's intermediate care facilities for the mentally retarded upon the consent of his legal guardian, Mary Doe, who is also his mother.

At the time of Samuel Doe's admission, CHR had a voluntary admission procedure which permitted the legal guardian of a mentally retarded person to consent to the voluntary admission of his ward to a mental retardation facility following certification from the local Community Mental Health Center that the services necessary to meet the habilitation needs of the mentally retarded individual were not available in the community and an administrative review of the mentally retarded person's medical, educational and habilitative records by a panel of professionals selected by CHR.

Respondents, plaintiffs below, instituted this civil rights action under 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) and (4) to challenge petitioner's admission procedures. In a series of Memorandum Opinions addressing CHR's original admission procedures and the legislation adopted by the Kentucky General Assembly to revise those procedures in response to its Memorandum Opinions and Preliminary Injunctions, the District Court ultimately determined that placement of an adult mentally retarded person in an intermediate care facility without a prior judicial hearing was a violation of Due Process, (R. 126, p. 4), and a violation of Equal Protection since prior hearings were routinely provided for the mentally ill. (R. 126, pp. 6-8). The District Court further held that persons involuntarily admitted to one of CHR's intermediate care facilities were entitled to periodic judicial review of their continued placement at the facility. (R. 126, p. 8). The District Court then enjoined Petitioner from admitting any mentally retarded person over the age of eighteen to CHR's intermediate care facilities without instituting prior judicial proceedings of involuntary hospitalization and from continuing to confine any mentally retarded person at such facilities who attains age eighteen without instituting an involuntary admissions proceeding. (R. 127, pp.1-2).

Petitioner appealed the injunction to the Sixth Circuit Court of Appeals which agreed with the District Court that admission of mentally retarded adults to CHR's intermediate care facilities by their guardians must be considered involuntary admissions. 848 F.2d at 1392. After finding that judicial proceedings for involuntary hospitalization were not required by the Due Process Clause, the Sixth Circuit held that the Equal Protection Clause requires Kentucky to utilize judicial proceedings to involuntarily hospitalize its mentally retarded since Kentucky uses judicial proceedings to involuntarily hospitalize its mentally ill. 848 F.2d at 1394-5.

Petitioner's petition for rehearing and rehearing en banc was denied on August 3, 1984. Petitioner's petition for writ of certiorari to this Court was also denied. 109 S.Ct. 495 (1988).

Prior to the District Court's November 20, 1986 preliminary injunction, less than 1% of the persons admitted to CHR's mental retardation facilities were admitted on an involuntary basis. (R. 37, p. 22). After the District Court's ruling, nearly all of such admissions were treated as involuntary.

Involuntary proceedings were initiated under Chapter 202B of the Kentucky Revised Statutes, which was then one of the shortest and least used chapters. Entitled "Mental Retardation Hospitalization," Chapter 202B contained only ten statutes including separate statutes for Chapter Title, Definitions, Exemptions From Personal Liability and Penalties for Violation. The operative section of KRS Chapter 202B was KRS 202B.050 which incorporated by reference all of the rights and procedures provided for the involuntary hospitalization of mentally ill persons under KRS Chapters 202A and 210.

The 1990 Kentucky General Assembly enacted sweeping revisions to KRS Chapter 202B in order to bring the Commonwealth's admission procedures for the mentally retarded into compliance with the Sixth Circuit's decision in *Doe* v. *Austin* and to address other issues that had arisen since the Commonwealth began utilizing judicial involuntary admission proceedings to authorize admissions to CHR's mental retardation facilities. Of the many changes and revisions contained in 1990 Acts, Chapter 147 (denominated House Bill 511 in the Opinions Below), only two areas remain the source of litigation.

The first area of dispute concerns the standard of evidence by which the trier of fact is to weigh the evidence presented at the judicial hearing. Prior to the 1990 legislative session, the standard of evidence specified in KRS Chapter 202A for involuntary admission to one of CHR's hospitals for the mentally ill (psychiatric hospital) was the "beyond a reasonable doubt" standard. There was no separate specified standard of evidence for involuntary proceedings for admission to one of CHR's mental retardation facilities.

Recognizing the admonition of *Addington* v. *Texas*, 441 U.S. 418, 99 S.Ct. 1804 at 1812, 60 L.Ed.2d 323 (1979) that the "beyond a reasonable doubt" standard may impose a burden that the Commonwealth cannot meet given the uncertainties of psychiatric diagnosis and thereby erect an unreasonable barrier to needed medical treatment, the General Assembly adopted the "clear and convincing" standard of evidence for proceedings under KRS Chapter 202B.

The 1990 legislation originally proposed to adopt the "clear and convincing" standard of evidence for involuntary admission proceedings for both the mentally retarded and the mentally ill. However, during the course of the legislative process, the language changing the "beyond a reasonable doubt" standard for involuntary hospitalization of the mentally ill was deleted from the act. The result of the legislative process was that KRS Chapter 202B now specifies that involuntary proceedings for admission to one of CHR's mental retardation facilities will be conducted under the "clear and convincing" standard of evidence; whereas, KRS Chapter 202A specifies that involuntary proceedings for hospitalization at one of CHR's psychiatric hospitals will be conducted under the "beyond a reasonable doubt" standard of evidence.

The second area of dispute concerns the persons permitted to be parties in the involuntary admission proceedings. Under KRS Chapter 202A, involuntary admissions to CHR's psychiatric hospitals were treated like criminal proceedings—there were no parties to the proceeding other than the Commonwealth and the respondent. Application of the same procedures in proceedings for admission to CHR's mental retardation facilities following the District Court's preliminary injunction of November 20, 1986 had unanticipated results as evidenced by the case of Tracy Horton.

Tracy was born on April 27, 1965 and diagnosed as having cerebral palsy at one year of age. (R. 213, p. 8, 10). She has never been able to speak or otherwise communicate with her parents and it has not been determined whether she can hear. (R. 213, p. 9). When she was a small child, Tracy could pull herself to a standing position using a coffee table, but as she grew older she lost the ability to stand at all. (R. 213, p. 7-8). Despite being continually enrolled in day programs, Tracy has no self-help skills. (R. 213, pp. 14-15).

When Tracy lived at home, her parents got her up in the morning, diapered her, cleaned her, fed her breakfast one spoonful at a time, dressed her, and placed her into a wheel chair. (R. 213, p. 16). Tracy's had pneumonia frequently and also suffered from congestive heart failure. (R. 213, p. 17, 21).

After 25 years of in-home care, Tracy's parents realized that they could not continue to provide for Tracy's needs at home and sought to have her placed in one of the CHR's intermediate care facilities for the mentally retarded. (R. 213, pp. 21-22, 27-28). Her parents then instituted an involuntary admission proceeding in the Jefferson District Court to have Tracy declared eligible to be admitted to Hazelwood ICF-MR. (R. 213, pp. 37-38).

After a jury trial, Tracy was determined to be eligible for a 365 day commitment to Hazelwood where she received intensive habilitative treatment from the facility's physical therapists, occupational therapists, nurses, physicians and other mental retardation professionals. (R. 213, pp. 44-45). At the end of the 365 day commitment, another jury trial was necessary to continue Tracy's enrollment at Hazelwood. This time the jury determined that Tracy no longer met the criteria for involuntary hospitalization. (R. 213, p. 53). Tracy's parents attempted to appeal the decision to the Jefferson Circuit Court, but their appeal was dismissed because they were not parties to the Jefferson District Court proceedings. The effect of the jury's decision was to require Tracy's parents to take her back home over their objections that they did not have the ability to care for her.

In House Bill 511, the Kentucky General Assembly recognized that mental retardation is a permanent condition—it cannot be cured or treated. (R. 69, pp. 29-30). Persons suffering from severe and profound mental retardation, like Tracy, have a continuing need for habilitation which entails:

> "teaching and training the retarded basic life and social skills such as walking, talking, eating, toileting, socializing, using money, traveling and working. *Philadelphia Police and Fire Assoc. for Handicapped Children* v. *City of Philadelphia,* 874, F.2d 156, (3rd. Cir. 1989).

The General Assembly also recognized that the role of care-giver or care-provider has traditionally fallen upon the mentally retarded person's parents or immediate family. When no parent or immediate family member is willing or available, that role may be filled by a court-appointed guardian who is charged with the statutory duty of determining his ward's care, comfort, maintenance and arrangements for such educational, social, vocational and rehabilitation services as will assist the ward in developing maximum self-reliance and independence. KRS 387.660.

Respondents requested the District Court to declare that numerous sections of House Bill 511 were unconstitutional and to enjoin enforcement of those sections. In its Memorandum Opinion of July 1, 1991, the District Court agreed with respondents with regard to the following:

1. Section 4(3) of House Bill 511, which requires an ICF-MR to discharge any voluntary patient whose treatment or care in an ICF-MR is no longer necessary or advisable, was held unconstitutional to the extent it "governs release of voluntarily admitted adults without any reference to such resident's right to release upon request." (R. 215, pp. 8-9).

2. Section 15(2) of House Bill 511, which authorizes commitment of mentally retarded persons upon the clear and convincing standard of proof, was found to violate the Equal Protection Clause. (R. 215, p. 11).

3. Sections 13, 15(3) and 22 of House Bill 511, which permit the parents and legal guardians of mentally retarded persons to participate in all aspects of the involuntary commitment proceedings as if parties, were found to violate both Equal Protection and Due Process Clauses. (R. 215, pp. 11-12).

Petitioner appealed to the U.S. Court of Appeals for the Sixth Circuit from the preliminary injunction enjoining the enforcement of the new admissions procedures contained in House Bill 511. No cross-appeal was taken from the District Court's finding that all other challenged sections of House Bill 511 adequately protected the constitutional rights of the mentally retarded.

The Sixth Circuit agreed with Petitioner that CHR's practice adequately protected the rights of voluntarily admitted patients to release upon their request. The Court held that the use of the clear and convincing standard of proof at involuntary admission proceedings for the mentally retarded while KRS Chapter 202A required the beyond a reasonable doubt standard for involuntary admission proceedings for the mentally ill violated Equal Protection. The Sixth Circuit further held that permitting the parents and legal guardians of mentally retarded persons to participate in their involuntary commitment proceedings violated the Equal Protection Clause and the Due Process Clause. This Petition now follows:

REASONS FOR GRANTING THE WRIT

1.

Guidance of the Circuits by This Court is Necessary to Prevent the Continued Needless Diversion of Scarce Public Funds From Beneficial Habilitative Services for the Mentally Retarded.

A review of case law digests over the past twenty years will disclose that the only guidance to the States concerning procedures for admission of mentally retarded persons to specialized mental retardation facilities operated by the States are the opinions of the Sixth Circuit reported herein at 848 F.2d 1386 (6th Cir. 1988) and at 965 F.2d 109 (6th Cir. 1991). While the apparent absence of litigation relating to the State's provision of habilitative services to citizens capable of benefiting from such services might lead some to conclude that the issues are sufficiently resolved to obvi-

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ate the need for further review at this time, the case at bar establishes the opposite conclusion.

The complaint in this case was filed on October 25, 1982. Due to the lack of guidance on the issues presented herein by our appellate courts, petitioner has been required to actively litigate this matter over the course of ten years with no immediate end in sight.

Kentucky, like all States, has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable to care for themselves. *Addington* v. *Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979). Like all other States, Kentucky has invested substantial state and federal funds in the construction of facilities, employment of professional personnel, purchase of equipment and the development of programs to provide needed and beneficial habilitative services to the mentally retarded.

Unlike the other States, Kentucky has been forced to stand by as its efforts to provide habilitative services to its needy citizens was hamstrung by preliminary injunctions requiring those who would seek such services for the benefit of their mentally retarded sons and daughters march through confusing, complex, unnecessarily expensive and time consuming procedural obstacles which deter all but the most resolute.

Petitioner has detailed a multitude of differences between the mentally retarded and the mentally ill; however, the decisions below require Kentucky to use the same procedures to determine whether a mentally retarded person may receive habilitative services at one of CHR's intermediate care facilities for the mentally retarded as are utilized to determine whether a mentally ill person requires involuntary hospitalization at one of CHR's psychiatric hospitals.

Kentucky's experience in these proceedings demonstrate, if anything, that each of the remaining fifty states is ripe for a long, expensive and unnecessary interruption of beneficial state services to needy individuals unless some appropriate guidance is provided to the Circuit Courts.

2.

The Decision of the Sixth Circuit Below Misapplied This Court's Instructions to the Lower Federal Courts Set Forth in *Kremens* v. *Bartley*, 431 U.S. 119, 97 S.Ct. 1709, 54 L. Ed.2d 184 (1977)

Kremens v. *Bartley*, 431 U.S. 119, 97 S.Ct. 1709, 54 L.Ed.2d 184 (1977), cautioned a District Court to pay "careful attention" to the difference between the mentally ill and the mentally retarded on remand of an action challenging admission procedures to state mental health facilities. 97 S.Ct. at 1718.

In the proceedings below, petitioner has established that mental retardation is a condition which occurs during the developmental period and involves subnormal intellectual functioning coupled with defects in adoptive behavior. KRS 202B.010. It is not a disease nor a form of mental illness. H. Robinson and N. Robinson, *The Mentally Retarded Child*, (1965); *Definition, Diagnosis, Classification and Associated Problems in Retardation*, Law and Psychology Review, Spring, 1975. The four classifications of mental retardation are based upon the individual's Intelligence Quotient as measured by various tests. *Kentucky Assoc. for Retarded Citizens* v. *Conn*, 510 F.Supp. 1233 at 1237 (W.D. KY 1980).

Mental retardation is a permanent condition—it cannot be cured or treated. (R. 69, pp. 29-30). Persons suffering from mental retardation are in need of special and continuing care called habilitation. However, such daily living skills are not learned permanently by mentally retarded persons: once habilitation ceases, they begin to regress. *Philadelphia Police and Fire Assoc. for Handicapped Children, Inc.* v. *City of Philadelphia*, 874 F.2d 154 (3rd Cir. 1989). Habilitation services are needed periodically as long as the mentally retarded person lives to maximize independence and avoid regression.

Unlike mental retardation, mental illness can originate at any time. Mental illness covers a much wider range of disability than mental retardation. It is described as amorphously as one's inability to cope with his environment. KRS 202A.014(3). There are more than 300 different diagnoses for mental illness and mental disorders contained in the Third Edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-III-R) published by the American Psychiatric Association. Subaverage intellectual functioning is not a component of mental illness.

Unlike mental retardation, mental illness can be, and usually is, successfully treated with modern medications. Most mentally ill people lead productive lives in society with the symptoms of their illness controlled through medication.

In contrast to the periodic and routine need of the mentally retarded for habilitative services, the involuntary hospitalization of the mentally ill is an unplanned and sporadic occurrence. After being forcefully removed from society and the endangering of others, the mentally ill person's illness is brought under control by diagnosis and administration of psychotropic medications which alter the patient's thought process. Once the patient's thought process is brought back under control, the patient is able to return to his previous position in society.

The intrusive nature of mandatory treatment at a state psychiatric hospital has caused this Court to observe that involuntary hospitalization of the mentally ill can have a stigmatizing effect. *Vitek* v. *Jones*, 445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980). There has been no showing of any stigmatization occurring to respondent or any member of respondent's class as a result of receiving habilitative services at one of CHR's facilities. Any stigma associated with being mentally retarded will occur regardless of whether the individual receives habilitation in one of CHR's facilities and could well worsen if habilitation is not received.

State laws are generally entitled to a presumption of validity against attack under the Equal Protection Clause. *Parham* v. *Hughes*, 441 U.S. 347, 99 S.Ct. 1742, 60 L.Ed.2d 269 (1979). Lawmakers have wide discretion in enacting measures which have the effect of treating some people differently from others, and such measures are valid unless they bear no rational relationship to a permissible state objective. *Id* at 99 S.Ct. 1745; *Schweiker* v. *Wilson*, 450 U.S. 221,101 S.Ct. 1074, 67 L.Ed.2d 1074 (1981).

City of Cleburne v. *Cleburne Living Center*, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985), observed that mentally retarded persons' reduced ability to cope made them different in a way which is relevant to legitimate state interests. In addition to assisting the mentally retarded with beneficial habilitative programs, Kentucky also has an interest in not imposing unnecessary procedural obstacles in making those services available to its citizens. *Parham* v. *J.R.*, 442 U.S. 524, 99 S.Ct. 2493 at 2505-6, 61 L.Ed.2d 101 (1979).

Petitioner respectfully submits that sufficient differences have been established between the mentally ill and the mentally retarded to permit the Kentucky General Assembly to draft the differing procedures for their admission to state-operated facilities as challenged in these proceedings.

CONCLUSION

In view of the profound impact the issues presented in this case will have upon (1) the provision of habilitative services to the mentally retarded by the various States through their separate programs; (2) the mentally retarded persons who can benefit from the habilitative services made available to them by their State; and (3) the State administrative or judicial bodies which will be required to determine which mentally retarded persons in need of the States' habilitative services will be permitted to receive such services, petitioner respectfully requests that this petition for writ of certiorari be granted.

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APPENDIX

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

No. 91-5932

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Samuel Doe, by his mother and next friend,
Mary Doe, on behalf of himself and all
others similarly situated, - - *Plaintiffs-Appellees,*

v.

Harry J. Cowherd, - - - - *Defendant-Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

OPINION—Decided and Filed June 1, 1992

Before: Keith, Circuit Judge; Lively, Senior Circuit Judge; and Cohn, District Judge.*

Keith, Circuit Judge. Defendant Harry J. Cowherd ("defendant") appeals the judgment of the district court ordering the State of Kentucky to amend its release and admissions procedures for mentally retarded persons at the State's institutions. For the reasons outlined below, we AFFIRM in part and REVERSE in part.

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*The Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

I.

This is a class action brought pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983. Plaintiff Samuel Doe ("plaintiff") is a mentally retarded adult who currently resides in a Kentucky Mental Retardation Residential Treatment Center ("RTC"). Plaintiff represents a class of citizens who are similarly situated to him as involuntarily committed adults in a Kentucky RTC. Defendant is Secretary of the Kentucky Cabinet for Human Resources. He appeals the July 1, 1991, judgment of the district court for partial summary judgment and preliminary injunction in favor of plaintiffs. The district court ordered the State of Kentucky (the "State") to amend its procedures for admissions and release of both voluntary and involuntary adults at RTCs.

The issues raised by the instant case stem from issues previously addressed by the Court in *Doe* v. *Austin*, 848 F.2d 1386 (6th Cir.), *cert. denied*, 488 U.S. 967 (1988). In *Austin*, we reviewed Kentucky's admission procedures for mentally retarded adults. Prior to our decision in *Austin*, Kentucky involuntarily committed mentally retarded adults to its RTCs without the benefit of a hearing. However, the State considered virtually all of its mentally retarded admissions to be voluntary. For example, the State treated those admissions that were initiated by the parent or guardian of the mentally retarded adult as voluntary. We held in *Austin* that mentally retarded adults are involuntary committed when admission is made upon the application of a parent or guardian. We also held that mentally retarded adults are entitled to procedural due process prior to being committed involuntarily.

The State is again before us challenging the district court's expansion of the principles which we enunciated in *Austin*. There are three issues raised in this appeal. The first is whether the State must implement a written provision that adults who are voluntarily admitted into a RTC must be released upon their request. Second, we are asked to determine whether the State must satisfy the "beyond a reasonable doubt" burden of proof in order to involuntarily commit a mentally retarded adult. The final issue is whether the State is prohibited from allowing relatives of a mentally retarded adult to join as parties in an action to involuntarily commit the mentally retarded person. The district court answered each of the above questions affirmatively. We reverse the district court's judgment as the first issue, and affirm on each of the remaining issues for the following reasons.

II.

In 1990, the Kentucky General Assembly enacted House Bill 511 which revised Ky. Rev. Stat. Ann. Chapter 202B. Our decision in *Austin* was based on the provisions of Chapter 202B, which governed admissions and discharges of mentally retarded persons.

Plaintiff's first challenge relates to § 4(3) of H.B. 511, which establishes that:

> Upon recommendation or approval of the interdisciplinary team of ICF/MR, the physician shall discharge any voluntarily admitted resident whose care and treatment in the ICF/MR is determined to be no longer necessary or advisable.

According to plaintiff, the statute is constitutionally infirm because it fails to provide for the release of a voluntarily admitted patient upon their request. The State asserts that although the statute does not explicitly provide for voluntarily admitted patients to be released upon request, the State does recognize such a right. The district court stated, however, that "[t]he right to release upon request is an extremely important right; and . . . it cannot be protected by statutory silence." Accordingly, the district court held that § 4(3) of H.B. 511 is unconstitutional to the extent that it fails to provide for the release of voluntarily admitted adults upon their request.

The State contends that we lack jurisdiction to decide this issue because the instant case fails to present an actual case or controversy. It contends that this Court may strike down legislation only at the instance of one who is himself immediately harmed or immediately threatened with harm by the challenged action. *See Poe* v. *Ullman*, 367 U.S. 497 (1961). We agree.

As a threshold matter, the class represented by plaintiff consists of involuntarily admitted patients. The challenged action affects mentally retarded adults who are voluntarily committed to a RTC. Therefore, the class represented in this action cannot be affected by the challenged action. Moreover, plaintiff has not shown that any voluntarily admitted patient has requested and been denied release from a Kentucky institution. Thus, there is no evidence of any harm whatsoever. Accordingly, we agree that there is no actual case or controversy arising from the instant action, and we reverse the district court's decision on this issue.

The next issue relates to H.B. 511's use of the clear and convincing standard of proof for involuntary commitments of mentally retarded adults. The State uses the beyond a reasonable doubt standard of proof for involuntary commitments of mentally ill adults. Plaintiff successfully argued before the district court that the lesser standard of proof for the mentally retarded violates equal protection.

At the time we decided *Austin*, Ky. Rev. Stat. Ann § 202B.050 provided that:

> All rights guaranteed by [Ky. Rev. Stat.] Chapters 202A (other than those rights enumerated in [Ky. Rev. Stat.] 202A.026 and 202A.051) and [Ky. Rev. Stat.] Chapter 210 to mentally ill persons shall apply to mentally retarded persons.

Ky. Rev. Stat. Ann. Chapter 202A provided for substantial procedural due process prior to the involuntary commitment of mentally ill patients. The rights for mentally ill patients included the right to a preliminary hearing before a person could be involuntarily committed to a state institution, the right to a final hearing and the right to a jury trial. The statute also provided for the right to counsel, the right to testify, present witnesses and cross-examine adverse witnesses, and the right to be present during proceedings.

In *Austin*, we specifically addressed the question of whether mentally retarded adults are entitled to procedural due process prior to being involuntarily committed. Because the State provided for mentally ill adults to receive a hearing prior to being involuntarily committed, we questioned whether there was any rational basis for denying a hearing to mentally retarded adults. The State failed to show any rational basis for differentiating between mentally retarded and mentally ill adults in the provision of a hearing prior to involuntary commitment. Accordingly, we held that equal protection required that the mentally retarded be given a hearing prior to their involuntary commitment. We fail to see any reason for the State to now believe that a substantially lessened burden of proof should govern those hearings for the mentally retarded.

The State asserts that there are several relevant differences between mentally ill and mentally retarded persons which provide a basis for the different standards of proof. It is clear that "the mere identification of differences is not enough; equal protection 'require[s] that a distinction made have some relevance to the purpose for which the classification is made.'" *Austin*, 848 F.2d at 1394, citing *Baxstrom* v. *Herold*, 383 U.S. 107, 111 (1966). We do not believe that there are any differences between these two classes or the purposes for their commitment which are relevant to the due process which they are entitled to receive.

The State asserts that the purposes for committing mentally retarded persons are different from the purposes for committing mentally ill persons. For example, the State asserts that mental retardation is a permanent, incurable condition, but mental illness can be, and usually is, successfully treated. According to the State, mentally retarded persons are not "treated" but are "habilitated" on a continuing basis. The State asserts that the services at mental retardation facilities are less "intrusive" than those provided for mentally ill patients. The State also contends that there is a stigmatization associated with mental illness that does not attach to mental retardation.

The State's assertions are unsupported by any evidence in the record. There is no evidence whatsoever to show that mentally retarded persons are not "stigmatized," or that the treatment that they receive is less "intrusive" than the treatment administered to mentally ill persons. There is also dispute as to whether mentally retarded persons can be treated so as to improve their condition. The mere assertion of distinctions is clearly insufficient to justify lessened standards to prove that a mentally retarded person should be institutionalized.

Moreover, the issue raised in this case relates to the *liberty* of mentally retarded persons who are threatened with involuntary commitment. Regardless of the asserted benefits of institutionalization, it nevertheless results in the loss of personal liberty. Yet the State seeks to curtail the liberty interests of the mentally retarded under more liberal standards than those standards used for mentally ill adults.

Kentucky law provides that "when a proceeding may lead to the loss of personal liberty, the defendant in that proceeding should be afforded the same constitutional protection as is given to the accused in a criminal prosecution." *Denton* v. *Commonwealth*, 383 S.W.2d 681, 682 (Ky. App. 1964). The mentally ill and mentally retarded are identical insofar as they lose their personal liberty by involuntary institutionalization. Accordingly, we hold that equal protection requires that the reasonable doubt standard of proof must apply in proceedings to involuntarily commit mentally retarded adults in Kentucky.

We also affirm the district court's holding that Kentucky's practice of allowing third parties to participate in the involuntary commitment proceeding of mentally retarded adults violates equal protection and due process. In *Austin*, we held that the decision to commit a mentally retarded adult is not within the discretion of his or her parents or guardians. *Austin*, 848 F.2d at 1386. Moreover, as recognized by the district court, these parties' interests may be adverse to the person facing commitment. Thus the inclusion of third persons as parties to the action (including the right to appeal decisions which they find adverse) imposes a greater burden than is imposed on similarly situated mentally ill adults. The State has advanced no rational basis for this distinction.

III.

For the above stated reasons, we AFFIRM in part and REVERSE in part.

Civil Action No. C 82-0738-L(A)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

SAMUEL DOE, et al. - - - - - - - - - *Plaintiffs*,

v.

HARRY J. COWHERD, M.D., Secretary,
Cabinet for Human Resources - - - *Defendant.*

MEMORANDUM OPINION

This class action pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983, challenging the procedures governing admissions and discharges at Kentucky's Mental Retardation Residential Treatment Centers [hereinafter "MRRTCs"] is submitted to the Court on plaintiffs' motion for summary judgment and preliminary injunction. For the reasons set forth below, the Court will enter partial summary judgment in favor of plaintiffs and a preliminary injunction in accordance with that partial judgment.

Plaintiff Doe filed this action in 1982 alleging that the procedures by which he and others had been admitted and retained at Kentucky's MRRTCs were unconstitutional. In a memorandum opinion entered November 20, 1986, this Court held that mentally retarded adults are entitled to a "judicial hearing and determination of the propriety of the commitment," either prior to the involuntary commitment or as soon as practicable thereafter. *Doe* v. *Austin*,[1] 668

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[1] Defendant Cowherd, Secretary of the Cabinet for Human Resources, was substituted for his predecessor, Elbert Austin, pursuant to Fed.R.Civ.P. 25 (d)(1).

Supp. 597, 600 (W.D. Ky. 1986), *aff'd in part, rev'd in part*, 848 F.2d 1386 (6th Cir.), *cert. denied*, 109 S.Ct. 495 (1988).

We also held that contrary to the 1986 amendments to K.R.S. 202B, applications by parents or guardians for commitment of mentally retarded family members or wards are *not* voluntary commitments, *id.*; that the Equal Protection Clause requires a judicial hearing and determination prior to commitment, *id.* at 601; and that the Due Process Clause requires periodic review of any commitment decision. *Id.* We, therefore, enjoined the defendant Secretary from committing allegedly mentally retarded adults to any MRRTC without first providing a judicial hearing to determine whether such individuals should be committed. *Id.* at 602.

On appeal, the United States Court of Appeals for the Sixth Circuit agreed that commitments of mentally retarded adults on applications by parents or guardians are, in actuality, involuntary. *Doe* v. *Austin*, 848 F.2d 1386, 1392 (6th Cir.), *cert. denied*, 109 S.Ct. 495 (1988). The Court of Appeals also agreed that Kentucky's procedures did not conform with the requirements of due process. *Id.* at 1394. As explained by the Sixth Circuit, although due process does not require full-blown judicial hearings prior to involuntary commitments of mentally retarded adults, due process does require that "mentally retarded adults in Kentucky receive, at a minimum," the six procedural safeguards established in *Vitek* v. *Jones*, 445 U.S. 480, 494-95 (1980).[2] *Doe* v. *Austin*, 848 F.2d at 1393-95.

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[2] In *Vitek* v. *Jones*, the Supreme Court affirmed the district court's decision that due process was violated by a statute allowing the transfer of a prisoner to a mental facility upon a finding by a physician that the prisoner suffered from a "mental disease or defect" and could not be given "proper treatment" in the prison.

(Footnote continued on next page)

Finally, the Sixth Circuit held that because Kentucky provides judicial hearings for the admission of *mentally ill adults to mental* health facilities, equal protection requires that Kentucky also provide judicial hearings for the admission of mentally retarded adults to MRRTCs. *Id.* at 1394-95. Likewise, the Sixth Circuit held that as Kentucky provides periodic judicial review for committed mentally ill adults, equal protection requires that Kentucky also provide some form of periodic review for committed mentally retarded adults. *Id.* at 1394-96. As to the formulation of these review procedures, the Sixth Circuit remanded the matter on the grounds that such a task was best left to the district court as it would have the benefit of compliance plans submitted by the parties. *Id.* at 1396 n.9.

Following the Supreme Court's denial of the Secretary's petition for a writ of certiorari, the parties began negotiating a compliance plan to implement the above-referenced holdings. In September 1989 they submitted a proposed Agreed Final Compliance Plan. This plan proposed procedures different from those enjoined and would have required Kentucky to give the same rights to mentally retarded adults with respect to involuntary commitments as is given to mentally ill adults.

However, in the meantime, the 1990 Kentucky General Assembly enacted House Bill 511 [hereinafter "HB 511"], an entirely new version of K.R.S. 202B for governing admissions and discharges of mentally retarded persons. Under HB 511, codified as the 1990 amendments to K.R.S. 202B, the previous incorporation by reference in K.R.S. 202B.050 to the rights of mentally ill persons established in K.R.S. 202A was totally eliminated.

Plaintiffs contend that under HB 511, they "again lack procedural protections" in admissions and discharges at MRRTCs. According to the plaintiffs, under the new law the rights of mentally retarded adults to the safeguards found in the civil commitment procedures afforded to mentally ill adults under K.R.S. 202A have been impermissibly narrowed to such a degree that their constitutional rights are once again at issue. Plaintiffs' Mem. at 4.

Plaintiffs first challenge the voluntary admission procedure established in § 4 (2) of HB 511 for admission of mildly or moderately mentally retarded adults without a judicial hearing. Section 4 (2) provides, in pertinent part, as follows:

> Upon the recommendation or approval of the interdisciplinary team of an ICF/MR,[3] a physician may . . . admit a mildly or moderately mentally retarded adult person who applies voluntarily [for admission] and who, in the opinion of the physician, possesses the mental capacity to give informed consent for admission.

(Footnote continued)

Doe v. *Austin*, 848 F.2d 1386, 1393 (1988), quoting *Vitek*, 445 U.S. at 483-84. The Supreme Court also approved the following procedures: (1) written notice of proposed action; (2) a subsequent hearing at which evidence relied on is presented, and the prisoner is allowed to testify and to present documentary evidence; (3) an opportunity to present witnesses on one's own behalf and to cross-examine adverse witnesses; (4) an independent decisionmaker who also has the authority to implement the decision; (5) a written statement by the factfinder setting forth the evidence and the reasons for the decision and transfer, if any; and (6) qualified and independent assistance provided to the prisoner. *Doe*, 848 F.2d at 1393-94, citing *Vitek*, 445 U.S. at 494-95.

[3] Although HB 511 amends MRRTC to ICF/MR [Intermediate Care Facility], this opinion will continue to use the MRRTC terminology.

Plaintiffs argue that this procedure conflicts with this Court's prior opinion and order and fails to provide procedures for safeguarding against the risk that a so-called voluntary admission would be "neither informed nor truly voluntary." Plaintiffs' Mem. at 8. Plaintiffs contend that the holding in the memorandum opinion entered January 9, 1986, was different from the holding in the memorandum opinion entered November 20, 1986, in that the latter opinion held that *all* mentally retarded adults, not only *mildly or moderately* retarded adults, were entitled to judicial hearings prior to admission. *Doe* v. *Austin*, 668 F.Supp. at 602.

After reviewing these opinions, this Court is convinced that its intent consisted of requiring judicial hearings only for those mentally retarded adults who could not *personally* apply with informed consent for voluntary admission. *See also*, Defendant's Mem. at 11-13. Therefore, the Court finds no conflict with its prior order. Likewise, the Court believes the new procedure under § 4(2) granting voluntary admissions where a staff physician makes the determination of an applicant's mental capacity for informed consent does not violate the Constitution.

Plaintiffs direct their next argument to the fact that HB 511 does not contain any provisions allowing voluntarily admitted residents to be released upon their own request. The absence of such a provision is in contrast to K.R.S. 202A.021(3) allowing the discharge of voluntarily admitted mentally ill patients who request release in writing. Plaintiffs contend that under § 4 (3) of HB 511, mentally retarded adults who voluntarily enter MRRTCs surrender their ability to leave the facility voluntarily.

Section 4 (3) provides as follows:

> Upon recommendation or approval of the interdisciplinary team of an ICF/MR, the physician shall discharge any voluntarily admitted resident whose care and treatment in the ICF/MR is determined to be no longer necessary or advisable.

In response to plaintiffs' arguments and concerns, the defendant Secretary admits that:

> he would have no authority to detain a voluntarily admitted patient who requested discharge without implementing the involuntary admission procedures contained in House Bill 511. The only basis for permitting the voluntarily admitted patient to receive treatment and habilitation . . . would be the patient's consent. . . . Once that consent is withdrawn, defendant would have no choice but to immediately discharge the patient or institute involuntary admission proceedings.

Def.'s Mem. at 17-18.

The Secretary further admits that "persons voluntarily admitted to CHR's mental retardation facilities have a right to release upon their request." Def.'s Mem. at 18, citing *Kentucky Ass'n of Retarded Citizens* v. *Conn*, 510 F.Supp. 1233, 1249 (W.D. Ky. 1980), *aff'd*, 674 F.2d 582 (6th Cir. 1982), *cert. denied*, 459 U.S. 1041 (1982). Despite this admission, the Secretary also argues that mentally retarded adults "have other constitutional and federal statutory rights not specified in House Bill 511," and the statute's silence as to those other rights does not mean that the Kentucky legislature intended to eliminate those rights "merely by failing to enumerate" them." Def.'s mem. at 18.

The Court disagrees. The right to release upon request is an extremely important right; and in this Court's opinion, it cannot be protected by statutory silence. Moreover, the Court also believes the Secretary's assurances that the right of release will be honored represents an inadequate basis for protecting the right, especially in the face of a statutory provision conditioning discharges of voluntarily admitted residents on actions by the facility's interdisciplinary team. Therefore, we hold the § 4 (3) of HB 511 is unconstitutional to the extent that it governs the release of voluntarily admitted adults without any reference to such residents' right to release upon request.

Plaintiffs next argue that HB 511's use of the clear and convincing standard of proof for involuntary commitments of mentally retarded persons violates equal protection. For the involuntary commitment of mentally ill persons, the Kentucky legislature mandates that the manner of the proceedings and the rules of evidence shall be the same as in any criminal proceeding, including the evidentiary burden of beyond a reasonable doubt. K.R.S. 202A.076(2). The legislature's enactment in § 15 (2) of the lower clear and convincing standard for the civil commitment of mentally retarded individuals thereby denies protection provided by state law to the mentally ill. Plaintiffs contend that no legitimate state interest is served by the lower burden of proof placed upon Kentucky. Nor can the state, according to plaintiffs, demonstrate a rational basis for distinguishing between the mentally ill and the mentally retarded. We also agree with plaintiffs that the threat to personal liberty is identical for both classes of persons.

The Secretary defends the lower burden of proof by pointing to *Addington* v. *Texas*, 441 U.S. 418 (1979), which holds that the Due Process Clause of the Fourteenth Amendment requires the use of the clear and convincing standard of proof in civil commitment proceedings involving the mentally ill. *Id.* at 431-32. However, as this Court reads *Addington*, it does not prohibit the use of the criminal reasonable doubt standard. Rather, as stated by the Supreme Court, "the substantive standards for civil commitment may vary from state to state, [and] procedures must be allowed to vary so long as they meet the *constitutional minimum.*" *Id.* at 431 (emphasis added). Here, the Kentucky legislature has elected to distinguish between mentally ill persons and mentally retarded persons, a situation which the *Addington* Court did not address.

This Court believes that *Doe* v. *Austin*, 848 F.2d at 1394, citing *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), mandates that mentally retarded persons be afforded the same protections as are mentally ill persons when facing involuntary commitment. Although differences admittedly exist between mentally ill and mentally retarded persons, "mere identification of differences is not enough; equal protection 'require[s] that a distinction made have some relevance to the purpose for which the classification is made.'" *Doe* v. *Austin*, 848 F.2d at 1394, quoting *Baxstrom* v. *Herold*, 383 U.S. 107, 111 (1966).

Here, while it may be true that mental retardation is easier to diagnose then mental illness, and further, that it is easier for a factfinder to reach a decision with reference to mental retardation then with reference to mental illness, we believe such facts are of constitutional significance only in determining how often to review the commitment of persons who are mentally retarded.

Under Kentucky law, "when a proceeding may lead to the loss of personal liberty, the defendant in that proceeding should be afforded the same constitutional protection as is given to the accused in a criminal prosecution." *Denton* v. *Commonwealth*, 383 S.W.2d 681, 682 (Ky. App. 1964); *see also*, *Messer* v. *Roney*, 772 S.W.2d 648 (Ky. App. 1989). In a criminal action, only two parties are involved: the government and the accused. If a judgment of acquittal is entered, the case ends. An appeal is not permitted. Here, we believe those protections which are given to mentally ill persons must be extended to mentally retarded persons facing civil commitment proceedings.

We, therefore, hold that § 15 (2) of HB 511 allowing mentally retarded persons to be committed under the clear and convincing standard of proof is unconstitutional under the Equal Protection Clause. We also hold unconstitutional under equal protection and due process §§ 13, 15 (3), and 22 of HB 511 allowing third parties, for example, parents or guardians, whose interests may be adverse to the mentally retarded person facing commitment, to participate in all aspects of the proceedings "as if" parties, including appeals of decisions they regard as adverse.

Finally, we address plaintiffs' argument that § 20 of HB 511 violates the Equal Protection Clause by denying to mentally retarded persons confronted with involuntary commitment proceedings legal services and representation provided by the Kentucky Department of Public Advocacy except as a last resort, that is, only after it is determined that private counsel is unavailable, either through court appointment or by inability to retain. This provision is in contrast to K.R.S. 202A.121, which automatically gives to mentally ill persons facing involuntary commitment hearings legal counsel from the Department of Public Advocacy. Although mentally retarded persons or those acting on their behalf might prefer legal services from the Department of Public Advocacy, we do not believe that § 20's directives deprive mentally retarded persons from receiving effective legal assistance. As such, we do not regard § 20 as violative of the Constitution.

We have entered this date partial summary judgment for the plaintiffs in accordance with this opinion and a preliminary injunction in accordance with the partial summary judgment.

Date: July 1, 1991

/s/ Charles M. Allen
Charles M. Allen, Senior Judge

cc: Counsel of Record

Civil Action No. C 82-0738-L(A)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

SAMUEL DOE, et al. - - - - - - - - - *Plaintiffs,*

v.

HARRY J. COWHERD, M.D., Secretary,
Cabinet for Human Resources - - - - *Defendant.*

PARTIAL SUMMARY JUDGMENT AND PRELIMINARY INJUNCTION

This action having come before the Court on plaintiffs' motion for summary judgment and preliminary injunction, and the parties having submitted their memoranda, responses and replies, and the Court having entered its memorandum opinion, accordingly,

IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. Plaintiffs are granted partial summary judgment and a preliminary injunction in accordance with that judgment as set forth below in subsections 2 and 3.

2. Sections 13, 15 (2), 15 (3), and 22 of House Bill 511 are unconstitutional; and therefore, defendant is enjoined from applying or enforcing these provisions.

3. Section 4 (3) of House Bill 511 is unconstitutional inasmuch as it provides for the discharge of voluntarily admitted mentally retarded adults without stipulating that such residents have a right to release upon their own request; and therefore, defendant is enjoined from using or

applying this provision where a voluntarily admitted mentally retarded resident requests release.

4. Plaintiffs are denied their motion for summary judgment on the other challenged sections of House Bill 511.

5. Pursuant to Fed.R.Civ.P. 65(c), plaintiffs shall give security in the amount of One Hundred Dollars ($100.00)

Date: July 1, 1991

/s/ Charles M. Allen
Charles M. Allen, Senior Judge

cc: Counsel of Record

No. 86-6274

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

SAMUEL DOE, by his mother and
next friend, MARY DOE, - - - *Plaintiff-Appellee,*

v.

ELBERT AUSTIN, Secretary, Cabinet for
Human Resources, - - - *Defendant-Appellant.*

On Appeal from the United States District Court
for the Western District of Kentucky.

Decided and Filed June 15, 1988

Before: KEITH, MILBURN, and NORRIS, Circuit Judges.

KEITH, Circuit Judge. Defendant Elbert Austin, Secretary, Cabinet for Human Resources for the Commonwealth of Kentucky, appeals the order of the district court granting a preliminary injunction and partial summary judgment in favor of plaintiffs, a certified class of mentally retarded persons already involuntarily committed or subject to involuntary commitment to a state-owned mental retardation residential treatment center (RTC) who had challenged the constitutionality of Kentucky's civil commitment scheme as applied to mentally retarded adults.[1]

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[1] Amici John Larry Voyles, Danny Dyer, Brian Shehan, the Parents and Relatives of Oakwood Facility, ICF/MR, Inc. (P.R.O.O.F) and concerned Families of Hazelwood Hospital, ICF/MR, Inc., parents and guardians of profoundly retarded individuals residing at Hazelwood Hospital, ICF/MR, filed a brief urging reversal.

For the following reasons, we AFFIRM in part and REVERSE in part.

Prior to 1986, and at the time that this matter was initiated, Kentucky provided a comprehensive statutory scheme to govern the involuntary civil commitment of the mentally ill, Ken. Rev. Stat. Ann. Chapter 202A (Baldwin 1982), which also governed the commitment of mentally retarded persons. Ken. Rev. Stat. Ann. § 202B.050.

Ken. Rev. Stat. Ann. Chapter 202A *et seq.* provided, in relevant part:

(1) No involuntary commitment would take place unless the person to be committed (a) presented a danger or threat of danger to self or others; (b) could reasonably benefit from treatment; and (c) unless hospitalization represented the least restrictive mode of treatment, Ken. Rev. Stat. Ann. § 202A.026;

(2) Although a staff physician could order an emergency admission, that physician must certify within twenty-four hours that an involuntary admission should occur, and any such emergency admission was limited to seventy-two hours, Ken. Rev. Stat. Ann. § 202A.031;

(3) A preliminary hearing would be held in the district court within six days of the initial detention (or examination, if no emergency admission was sought), and a final hearing would take place within twenty-one days, Ken. Rev. Stat. Ann. § 202A.071;

(4) The preliminary hearing although not required to be formal, would provide an opportunity for the person to be committed to testify, to present witnesses, and to cross-examine witnesses who had testified against her. Ken. Rev. Stat. Ann. § 202A.

076(1). The final hearing would provide the same safeguards; in addition, the rules of criminal procedure would apply, including the duty of the Commonwealth to prove beyond a reasonable doubt that confinement was warranted. Moreover, there was a right to a jury trial unless that right was waived. Ken. Rev. Stat. Ann. § 202A.076(2);

(5) The person to be committed had a right to counsel, Ken. Rev. Stat. Ann. § 202A.121, and a right to be present throughout the proceedings (unless this right was waived, or unless her conduct was unreasonably disruptive). Ken. Rev. Stat. Ann. § 20 2A.131;

(6) Discharge by an authorized staff physician during the prescribed period of involuntary commitment when the criteria for involuntary commitments were no longer met, Ken. Rev. Stat. Ann. § 202A.171;

(7) The opportunity for convalescent leave during the prescribed period of involuntary commitment, Ken. Rev. Stat. Ann. § 202A.181;

(8) A limitation of the prescribed period of confinement to sixty or three hundred sixty days without further judicial proceedings, Ken. Rev. Stat. Ann. § 202A.051.

Ken Rev. Stat. Ann. § 202B.050, before 1986, provided that all rights guaranteed by Ken. Rev. Stat. Ann. Chapters 202A and 210[2] would apply to mentally retarded persons. Section 202B.040 added the additional required determination to § 202A.026 that treatment that could reasonably

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[2] Ken. Rev. Stat. Ann. Chapter 210 *et seq.* codifies the institutional structure of Kentucky's mental health care system; it is not at issue in this appeal.

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benefit the individual be available in the hospital or mental retardation residential treatment center. Ken. Rev. Stat. Ann. § 202B.040(4). Furthermore, no mentally retarded person could be involuntarily hospitalized without the consent of the Secretary of the Cabinet for Human Resources, unless a determination of a concurrent mental illness requiring commitment was made pursuant to Chapter 202A. Ken. Rev. Stat. Ann. § 202B.030.

Despite the existence of this comprehensive statutory scheme, the Cabinet for Human Resources formed the Record Review Committee (RRC) for the purpose of controlling admissions to RTCs of mentally retarded persons. The RRC consisted of, at a minimum, a physician, a psychologist, a social worker, and a registered nurse. Procedurally, a parent or guardian was required to contact the local Comprehensive Care Center (operated by the Regional Mental Health-Mental Retardation Board), which would refer the mentally retarded person to the RRC. The written admissions policy of the Cabinet set out standards for admission:

> The suitability for admission to a mental retardation facility is determined by: a) the availability of appropriate alternative residential and training programs in the community, b) the availability of appropriate living and training space within the recommended facility, c) the severity of the applicant's handicap, and d) the status of the family's situation.

("Admissions Policies and Procedures for Mental Retardation Residential Facilities, " August 21, 1981).

The RRC procedure accounted for virtually all admissions of mentally retarded persons to RTCs; indeed, during 1982, 1983, 1984 and 1985, only one mentally retarded person was admitted pursuant to the statutory procedures for involuntary commitment. However, the Cabinet's view has

consistently been that admissions under the RRC procedure, initiated by the parent or guardian, are voluntary in nature. Moreover, if the committed person was able to sign the Resident's Bill of Rights form which was presented at admission, by signature or by marking an "X," her admission was considered to be voluntary.

Once a person was admitted, his or her continued commitment was ostensibly evaluated according to the Mental Retardation Facility Discharge Protocol, based on Ken. Rev. Stat. Ann. § 210.270. That section provides a mechanism for community placements once the RTC staff determines that such placement is appropriate, including provisions for challenges to reclassification.[3]

The named plaintiff, Samuel Doe, was placed in 1971, at age eighteen, in the custody of what is now the Kentucky Cabinet for Human Resources. Under the authority of the Secretary of the Cabinet, he was institutionalized in the Outwood State Hospital, Dawson Springs, Kentucky. In 1977, while still at Outwood, he was adjudicated as incompetent at the initiation of the Commonwealth. Soon thereafter, his mother was appointed as his legal guardian. Doe has received no independent review of his confinement, judicial or otherwise, throughout the seventeen years of his institutionalization.

Plaintiffs brought this action pursuant to 42 U.S.C. § 1983 challenging the failure of Kentucky to provide the safeguards required by Ken. Rev. Stat. Ann. Chapters 202A and 202B. In its first memorandum opinion, the district court found that defendants had adopted a policy af allowing parents to exert an absolute veto over the decision to

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[3] Additionally, the Cabinet had adopted a policy which allowed parents an absolute veto over the decision to place their mentally ill children in community placements. This policy was held to be unconstitutional in the district court's first opinion, and it not at issue in this appeal.

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release a patient to a community placement, and that such a practice was contrary to the holding of the Supreme Court in *Parham v. J.R.*, 442 U.S. 584 (1979). Memorandum Opinion of March, 28, 1984 (Memorandum I) at 13-17. The district court denied summary judgment in all other respects.

In its second memorandum opinion, the district court noted that because the great majority of profoundly and severely mentally retarded persons are incapable of making the decision as to whether admission into a RTC is in their best interest, all such admissions were to be considered involuntary. Memorandum Opinion of January 9, 1986 at 3, 9 (Memorandum II). It then concluded that, because Kentucky had declared that the mentally ill and the mentally retarded would be treated in the same manner, it constituted a denial of equal protection to apply the involuntary commitment statute to the mentally ill while refusing to make its provisions available to the mentally retarded. Memorandum II at 5-8.

In response to the district court's order, the Kentucky General Assembly amended Chapter 202B in an attempt to avoid the result reached by the district court. Ken. Rev. Stat. Ann. § 202B.050 was amended to read:

> All rights guaranteed by K.R.S. Chapters 202A (other than those rights enumerated in K.R.S. 202A.026 and 202A.051) and K.R.S. Chapter 210 to mentally ill persons shall apply to mentally retarded persons.

Ken. Rev. Stat. Ann. § 202B.050 (Baldwin 1986). Moreover, Ken. Rev. Stat. Ann. § 202B.040, listing the requirements for admission, was amended to include a fifth subsection:

> When a person who is alleged to be mentally retarded is involuntarily committed, there shall be a determination that:

> (1) He is a mentally retarded person:
>
> (2) He presents a danger or a threat of danger to self or others;
>
> (3) The least restrictive alternative mode of treatment requires placement in a hospital or mental retardation residential treatment center;
>
> (4) Treatment that can reasonably benefit the individual in the hospital or mental retardation residential treatment center; and
>
> (5) The application by parents or guardians for placement for their retarded family member or ward in any mental retardation treatment center shall not be considered an involuntary commitment under this section, provided the retarded family members' application has been evaluated by an interdisciplinary team as defined in K.R.S. 202B.010 and the subsequent admission fully complies with the provisions of K.R.S. Chapter 202B.

Ken. Rev. Stat. Ann. § 202B.040 (1986). The effect of this amendment was to define most admissions as technically "voluntary," without reference to the actual or independent wishes of the person to be committed.

Finally, a new section, Ken. Rev. Stat. Ann. § 202B.045 (1986), codified new requirements for admission and discharge:

> (1) Admission:
>
> (a) Patients shall be admitted only upon the approval of a physician. The facility shall admit only persons who have a physical or mental condition which requires developmental nursing services and a planned program of active treatment:

(b) The interdisciplinary team shall:

1. Conduct a comprehensive evaluation of the individual, not more than three (3) months before admission, covering physical, emotional, social, and cognitive factors; and

2. Prior to admission define the need for service without regard to availability of those services. The team shall review all available and applicable programs of care, treatment, and training and record its findings;

(c) If admission is not the best plan but the individual must be admitted nevertheless, the facility shall clearly acknowledge that the admission is inappropriate and initiate plans to actively explore alternatives;

(d) Before admission, the resident and a responsible member of his family or committee shall be informed in writing of the established policies of the facility and fees, reimbursement, visitation rights during serious illness, visiting hours, type of diets offered and services offered; and

(e) The facility shall provide and maintain a system for identifying each resident's personal property and facilities for safekeeping of his declared valuables. Each resident's clothing and other property shall be reserved for his own use.

(2) Discharge planning. Prior to discharge the facility shall have a postinstitutional plan which identifies the residential setting and support services which would enable the resident to live in a less restrictive alternative to the current setting. Before a resident is released, the facility shall: (a) Offer counseling to parents or guardians who request the release of a resident concerning the advantages and disadvantages of the release; (b) Plan for release of the resident, to assure that appropriate services are available in the resident's new environment, including protective supervision and other followup services; and (c) Prepare and place in the resident's record a summary of findings, progress, and plans.

The "interdisciplinary team" was defined as:

> the group of persons responsible for the diagnosis, evaluation and individualized program planning and service implementation for the resident. The team is composed of a physician, a psychologist, a registered nurse, a social worker, and other professionals, at least one (1) of whom is a qualified mental health professional, and many include the resident, the resident's family, or the guardian.

Ken. Rev. Stat. Ann. § 202B.010(1) (1986). As the district court noted, "[t]he 1986 amendments (HB 477) effectively eliminated the rights of mentally retarded persons to a judicial hearing prior to involuntary commitment." Memorandum Opinion of November 20, 1986 (Memorandum III).

Plaintiffs moved for a summary judgment declaring HB 477 unconstitutional, while defendant moved for reconsideration of the district court's opinion and partial summary judgment of January 9, 1986. On November 20, 1986, the district court (a) reconsidered its previous holding that Kentucky's commitment procedures conformed with due process, and held that due process required a judicial hearing prior to commitment; (b) found that Kentucky could not define applications by parents or guardians for placement as "voluntary," Ken. Rev. Stat. Ann. § 202B.-

040(5) (1986); and (c) reaffirmed that equal protection required a judicial hearing. Defendant appeals.

II.

Involuntary civil commitment to a mental institution represents "a massive curtailment of liberty," requiring due process protection. *Vitek* v. *Jones*, 445 U.S. 480, 491-92 (1980); *Humphrey* v. *Cady*, 405 U. S. 504, 509 (1972). Indeed, the liberty deprivation resulting from involuntary commitment is more than a loss of mere physical freedom; the stigma which attaches upon entry to a mental health facility can have a profound impact upon individual liberty. *Addington* v. *Texas*, 441 U.S. 418, 425-26 (1979).

The Commonwealth does not contend that it may confine persons thought to be mentally retarded without providing any degree of due process. Instead, the Commonwealth argues that: (A) the named plaintiff does not have standing to pursue the class action because his confinement is, in fact, voluntary; and (B) the due process requirement is satisfied by an administrative procedure such as the one now provided by the Commonwealth, rather than requiring a judicial officer.

A.

As stated above, appellant's argument that Samuel Doe lacks standing to challenge the legality of his confinement depends on the voluntariness of both his initial and continued commitment. If, as appellant contends, Doe entered the RTC voluntarily, and remains voluntarily, he would not present a controversy for adjudication.

However, we note that appellant has a view of "voluntary" behavior which is, to say the least, expansive. By legislative fiat, the Commonwealth has deemed admissions initiated by a parent or guardian to be voluntary, with no regard for the actual wishes of the committed person. Ken.

Rev. Stat. Ann. § 202B.040(5) (1986). In fact, as stated by the district court:

> As noted by this Court in *Kentucky Ass'n for Retarded Citizens* v. *Conn*, 510 F. Supp. 1233 (1980), *aff'd* 674 F. 2d 582 (6th Cir.), *cert. denied*, 459 U.S. 1041 (1982), many retarded adults are placed in [RTCs] by state appointed guardians who have no family ties with the mentally retarded person, and, even in those cases where the mentally retarded person is sought to be placed in an [RTC] by a relative or person who is also his legal guardian, the label of "voluntary commitment" cannot stand up in the face of the fact that the mentally retarded person is being committed without his or her consent. *Conn, supra*, 510 F. Supp. at 1248-49.

Memorandum Opinion at 6.

We recognize that the Supreme Court has, at least implicitly, viewed the commitment of a minor to a mental facility by a parent or guardian, subject to review by a neutral factfinder, as a voluntary admission. *Parham* v. *J.R.*, 442 U.S. 524 (1979); *Pennsylvania* v. *Institutionalized Juveniles*, 442 U.S. 640 (1979). However, as we discuss more fully in Section IIB, *infra*, minor children simply do not stand in the same position as adults with their parents. The traditional interrelationship of interests shared by parents and their minor children is not as presumptive as the minor passes from childhood to adulthood.

Likewise, the notion that the continuing confinement of the class members is voluntary notwithstanding the possible involuntariness of their initial confinement is, at best, an illusion. Indeed, the practice of relying upon some affirmative act on the part of profoundly and severely retarded persons to signal their will to escape confinement, coupled with the presence of a parent or guardian who may have played a pivotal role in institutionalizing the admittee in the first instance, creates a quite palpable danger that the adult child will be "lost in the shuffle." Cf. *Parham,* 442 U.S. at 619. We decline to adopt a measure of voluntariness for the commitment of adults that favors form over substance.[4] Therefore, we agree with the district court that the commitment of mentally retarded adults by the Commonwealth upon application by a parent or guardian is to be considered involuntary.[5]

B.

The district court, relying upon the analysis of *Clark v. Cohen,* 613 F. Supp. 684 (M.D. Pa. 1985), *aff'd,* 794 F. 2d 79, *cert. denied,* 107 S. Ct. 459 (1986) (and its predecessor, *Dixon* v. *Attorney General of Commonwealth of Pennsylvania,* 325 F. Supp. 966 (M.D. Pa. 1971)), held that it would be a violation of due process for the Commonwealth to involuntarily commit a mentally retarded adult without a

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[4] For the same reasons, we cannot conclude, as amici argue, that the due process protections which are a part of the formal guardianship hearing, KRS 387.500 *et seq.,* vitiate the need for a hearing at the time of commitment. Moreover, the drastic curtailment of liberty which physical commitment represents makes a guardianship proceeding, which may have occurred at some time long before the actual confinement, a poor substitute for a contemporaneous hearing.

[5] Of course, because these admissions are involuntary, a determination must be made pursuant to § 202B.040 that the admittee presents a danger or a threat of danger to self or others, that confinement in a hospital or RTC represents the least restrictive alternative mode of treatment, and that reasonably beneficial treatment is in fact available at a hospital or RTC. The statute, while not explicit, seems to contemplate that the interdisciplinary committee would make such a determination.

prior *judicial* hearing. Memorandum Opinion at 4. On appeal, the Commonwealth argues that the due process claim asserted by appellees is controlled by *Parham, supra.*

In *Parham,* the Supreme Court held that the admission of minors to state mental health facilities by their parents was constitutional so long as an "inquiry [was] made by a 'neutral factfinder' to determine whether the statutory requirements for admission [were] satisfied." 442 U.S. at 606. The court found that a formal or informal hearing was not required, and explicitly endorsed the use of informal, traditional medical investigative techniques. 442 U.S. at 607. However, we do not view *Parham* as controlling. The Court in *Parham* was concerned with the commitment of minor children, and its conclusions flow more or less naturally from the unique and traditional relationship shared between parent and child. 442 U.S. at 602-03; *Clark* v. *Cohen,* 613 F. Supp. at 699. "Once someone becomes an adult, one's parents lose that degree of authority found so crucial *in Parham.*" *Clark,* 613 F. Supp. at 699. Moreover, the interest of the parents in avoiding "significant intrusion into the parent-child relationship." at noted in *Parham,* 442 U.S. at 610, is simply not as great in the case of an adult.

We recognize that the decision to commit a person because of mental retardation is, to a large degree, medical in nature. As noted on *Parham,* "neither judges nor administrative hearing officers are better qualified than psychiatrists to render psychiatric judgments." 442 U.S. at 607. However, "[t]he medical nature of the inquiry . . . does not justify dispensing with due process requirements. It is precisely the subtleties and nuances of psychiatric diagnoses that justify the requirement of adversary hearings." *Vitek* v. *Jones,* 445 U.S. at 495. Although dispensing with an adversary proceeding may be justified in the case

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of a child, we cannot conclude that adults stand in the same position.

However, we also cannot agree with the conclusion of the district court that, because *Parham* is not controlling, due process requires that adults who are involuntarily committed are entitled to a *judicial* hearing. Although, as a matter of policy, precommitment review by a judicial officer would ensure the most vigorous protection of the mentally retarded, and thus, might be preferable, it has been noted in a variety of situations that due process does not require that the neutral trier of fact be legally trained or a judicial or administrative officer. *Parham*, 442 U.S. at 607; *Morrissey* v. *Brewer*, 408 U.S. 471, 489 (1972) (parole revocation hearing); *Goldberg* v. *Kelly*, 397 U.S. 254, 271 (1970) (hearing prior to termination of AFDC benefits).

In identifying those procedures which are required to ensure due process, we are guided by the Supreme Court's opinion in *Vitek* v. *Jones*, 445 U.S. 480 (1980). In *Vitek*, a convicted felon was transferred from a state prison to a mental facility under a state statute which allowed the Director of Correctional Services to effectuate such a transfer upon a finding by a designated physician or psychiatrist that a prisoner "suffers from a mental disease or defect" and "cannot be given proper treatment" in the prison itself. 445 U.S. at 483-4. In affirming the district court's holding that the statute, as applied to the prisoner, deprived him of due process, the Supreme Court approved the district court's requirement of the following minimum procedures:

1. Written notice to the prisoner that a transfer to a mental hospital is being considered;
2. A hearing, sufficiently after the notice to permit the prisoner to prepare, at which disclosure to the prisoner is made of the evidence being relied upon for the transfer and at which an opportunity to be

heard in person and to present documentary evidence is given;
3. An opportunity at the hearing to present testimony of witnesses by the defense and to confront and cross-examine witnesses called by the State;
4. An independent decisionmaker;[6]
5. A written statement by the factfinder as to the evidence relied on and the reasons for transferring the inmate;
6. Qualified and independent assistance must be provided to the inmate.

445 U.S. at 494-5.

Without question, due process requires that mentally retarded adults in Kentucky receive, at a minimum, the procedural safeguards listed above. If these basic safeguards are required before an inmate is transferred from a prison to a mental hospital, surely a person thought to be mentally retarded must be afforded at least the same level of protection before being removed from an ostensibly unfettered existence in society to the confines of an institution. *See Morris, The Supreme Court Examines Civil Commitment Issues: A Retrospective and Prospective Assessment*, 60 Tul. L. Rev. 927, 942 (1986).

Under the current statutory procedure for the involuntary commitment of adults in Kentucky, however, there is no formal mechanism for providing notice, and no method of assuring that the adequacy of notice is related to the time which the potential admittee would require to prepare for the hearing. There is no procedure whereby the admittee may present witnesses or documentary evidence, nor is there a clear opportunity for cross-examination. No independent assistance is allowed by the statute.[7] Moreover the parent or guardian of the person to be committed is allowed to be a member of the interdisciplinary team, which poses a serious threat to impartiality. Ken. Rev. Stat. Ann. § 202B.010(1) (1986). Therefore, although we do not conclude that a judicial hearing is required, we agree with the district court's conclusion that the current procedure does not conform with due process.

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[6] Moreover, the independent decisionmaker must have the authority to implement its decision. *See Parham*, 442 U.S. at 607; *Clark* v. *Cohen*, 794 F. 2d at 86.

III.

The Equal Protection Clause of the Fourteenth Amendment requires "that all persons similarly situated should be treated alike." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985). If a state enacts legislation which treats different classes of people differently, the classification drawn by the statute must be rationally related to a legitimate state purpose, 473 U.S. at 440. The district court held that the denial of a judicial hearing deprived appellees of equal protection under the laws. We agree.

The Commonwealth has not demonstrated that it has any rational basis for distinguishing between the mentally ill and the mentally retarded with regard to a judicial determination of their eligibility for civil commitment. We recognize that, as a matter of fact, there are differences between the mentally ill and the mentally retarded. *See Kremens v. Bartley*, 431 U.S. 119, 135-36 (1977). However,

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[7] The statute anticipates that the parent or guardian would participate in the process; however, such assistance could hardly be deemed to be independent. *See Lessard* v. *Schmidt*, 349 F. Supp. 1078, 1098-99 (E.D. Wis. 1972), *vacated and remanded for a more specific order*, 414 U.S. 743, *order on remand*, 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated and remanded on other grounds*, 421 U.S. 957 (1975), *order reinstated on remand*, 413 F. Supp. 1318 (E.D. Wis. 1976).

the mere identification of differences is not enough; equal protection "require[s] that a distinction made have some relevance to the purpose for which the classification is made." *Baxstrom* v. *Herold*, 383 U.S. 107, 111 (1966).

The Commonwealth identifies two interests which it argues are served by the distinction it draws between the mentally ill and the mentally retarded: (1) an interest in not imposing unnecessary procedural obstacles which might prohibit legal guardians from seeking available services for their mentally retarded wards; and (2) its interest in prioritizing diagnostic and service resources to the mentally retarded as soon as possible instead of expending resources in time-consuming procedures prior to admission. However, surely these interests apply to the mentally *ill* as well; the Commonwealth cannot show that the *distinction* which is drawn is rationally related to its stated purposes. *Baxstrom,* 383 U.S. at 111-12; *see Jackson v. Indiana,* 406 U.S. 715, 724 (1972). Therefore, we agreed with the district court that equal protection requires the Commonwealth to provide a judicial hearing to appellees, either upon admission, or, if now committed, when they reach adulthood.

IV.

Appellants further argue that the district court erred in holding that periodic judicial review over the course of commitment was required by equal protection. Appellees, in response, interpret the opinion below as holding that the requirements of equal protection *and* due process mandated periodic judicial review. However, one could conclude from a fair reading of the Memorandum Opinion that the district court did not in fact rule on this issue. After a discussion of the difference between the prospects of recovery for the mentally ill and the mentally retarded, and after noting that "this fundamental difference seems to indicate that the state could prescribe different modes of due process for the review of the commitment of severely and profoundly mentally retarded adults versus the review of the commitment of mentally ill adults," Memorandum III at 8-9, it goes on to conclude:

> However, it is not our duty to spell out at this juncture what such due process procedures might be, and we have not yet been cited to any statute or decision which the parties contend controls the review rights of the mentally retarded adults.
>
> Our only function at this time is to hold that there must be some judicial review, at some appropriate time, of the commitment of persons who are eighteen years or older and who are mentally retarded. Suffice to say that the statute, as it now stands, is unconstitutional with respect to the right to a judicial hearing of menally retarded adults prior to their involuntary commitment. *Clark v. Cohen*, 613 F. Supp. 684 (M.D. Pa. 1985).

Memorandum III at 9.

A fair reading of this section of the opinion would seem to indicate that the phrase "judicial review" in the above quote refers to the district court's conclusion that due process and equal protection, require that, at *some* point, a judicial determination must be made. It is not at all clear that the district court held that due process or equal protection required *periodic* judicial review; indeed, given the fact that the district court recognized that legitimate and relevant factors distinguished the mentally ill and the mentally retarded concerning the efficacy of treatment once they were committed, it at least seems unlikely that appellant's interpretation is correct. However, because both parties have concluded, through their respective interpretations, that there was a holding on this issue, and because both interpretations are at least conceivable from a reading

of the Memorandum Opinion, we shall discuss whether due process or equal protection requires periodic judicial review.[8]

A.

Our discussion of judicial hearings at admission as a requirement of due process, Section IIB, *supra,* is applicable to our analysis here. If one has no due process right to a judicial hearing before one is initially committed, logic dictates that no such right exists during the period of confinement. Of course, because involuntary confinement cannot continue after the basis for that confinement ceases to exist, due process requires that *some* periodic review take place during confinement. *See O'Connor v. Donaldson,* 422 U.S. 563, 574-75 (1975). However, as in the case of the initial admission, we cannot say that due process requires a periodic *judicial* review.

B.

As the district court noted, for purposes of equal protection analysis of the requirement for periodic review, "it is recognized that mentally ill persons may recover from their mental illnesses within relatively short periods after their . . . commitment, whereas severely and profoundly mentally retarded persons very rarely experience such dramatic improvements in their condition." Memorandum at 8-9. Thus, there may be constitutionally valid reasons for providing different methods of periodic review for the mentally retarded and the mentally ill. However, we see no legitimate interest of the Commonwealth which would justify denying the mentally retarded periodic judicial review while providing the same to the mentally ill. Therefore, the Commonwealth must make a judicial review procedure available to the mentally retarded.[9]

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[8] Also, there is little point in reserving the issue for another day, as it is a virtual certainty that this court shall be required to address it at some juncture.

V.

Therefore, for the foregoing reasons, we REVERSE the judgment of the district court inasmuch as it mandates a judicial hearing prior to commitment and periodic judicial review as requirements of due process, and REMAND this issue to the district court to allow it an opportunity to revise the grant of partial summary judgment in a manner consistent with this opinion. In all other respects, the judgment below is AFFIRMED.

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[9] The task of resolving how that procedure may differ from that provided to the mentally ill is one best left to the district court, as it will have the benefit of plans submitted by the parties, and can make findings of fact concerning the relative prognoses of the mentally retarded and the mentally ill.

No. 86-6274

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SAMUEL DOE, by his mother and
next friend, MARY DOE, - - - *Plaintiff-Appellee,*

v.

ELBERT AUSTIN, Secretary, Cabinet for
Human Resources, - - - *Defendant-Appellant.*

ORDER — Filed August 3, 1988

BEFORE: KEITH, MILBURN and NORRIS, Circuit Judges

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

Entered by Order of the Court

(s) Leonard Green
Leonard Green, Clerk

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C 82-0738-L(A)

SAMUEL DOE, et al., - - - - - - *Plaintiffs,*

v.

ELBERT AUSTIN, Secretary, Cabinet for
Human Resources, - - - - *Defendant.*

MEMORANDUM OPINION

This action is presented to the Court on the motion of the plaintiff for preliminary injunction and summary judgment, and on the motion of the Defendant for the Court to reconsider its opinion and partial summary judgment of January 9, 1986.

Since the opinion of January 9, 1986 was rendered, the Kentucky legislature amended K.R.S. Chapter 202B dealing with the commitment of mentally retarded persons. 1986 Ky. Acts ch. 79 (HB 477) at pp. 162-63. These amendments became effective on March 6, 1986 when approved by the Governor. Prior to the enactment of the amendments, the statute provided that "[a]ll rights guaranteed by K.R.S. Chapters 202A and 210 to mentally ill persons shall apply to mentally retarded persons." K.R.S. 202B.050 (1982). These rights included the procedural due process right to a preliminary and final judicial hearing in a district court of the Commonwealth of Kentucky to determine whether the mentally retarded individual should involuntarily be hospitalized in accordance with the applicable statutory criteria. K.R.S. 202A.051 and K.R.S. 202B.040 (1982).

The 1986 amendments (HB 477) effectively eliminated the rights of mentally retarded persons to a judicial hearing prior to involuntary commitment. K.R.S. 202B.050, as amended, reads as follows:

> All rights guaranteed by K.R.S. Chapters 202A (other than those rights enumerated in K.R.S. 202A.026 and 202A.051) and K.R.S. Chapter 210 to mentally ill persons shall apply to mentally retarded persons. *Id.*

Furthermore, a new subsection (5) was added to K.R.S. 202B.040 (1986), which now reads as follows:

> When a person who is alleged to be mentally retarded is involuntarily committed, there shall be a determination that:
>
> (1) He is a mentally retarded person;
>
> (2) He presents a danger or a threat of danger to self or others;
>
> (3) The least restrictive alternative mode of treatment requires placement in a hospital or mental retardation residential treatment center;
>
> (4) Treatment that can reasonably benefit the individual is available in the hospital or mental retardation residential treatment center; and
>
> (5) The application by parents or guardians for placement for their retarded family member or ward in any mental retardation treatment center shall not be considered an involuntary commitment under this section, provided the retarded family member's application has been evaluated by an interdisciplinary team as defined in K.R.S. 202B.010 and the subsequent admission fully complies with the provisions of K.R.S. Chapter 202B.

Thus, the statute now contemplates that many, if not most, commitments of the mentally retarded shall not even be considered involuntary. A new section, K.R.S. 202B.045 (1986), spells out the requirements for admission and discharge:

> (1) Admission:
>
> (a) Patients shall be admitted only upon the approval of a physician. The facility shall admit only persons who have a physical or mental condition which requires developmental nursing services and a planned program of active treatment;
>
> (b) The interdisciplinary team shall:
>
> (1) Conduct a comprehensive evaluation of the individual, not more than three (3) months before admission, covering physical, emotional, social, and cognitive factors; and
>
> 2. Prior to admission define the need for service without regard to availability of those services. The team shall review all available and applicable programs of care, treatment, and training and record its findings;
>
> (c) If admission is not the best plan but the individual must be admitted nevertheless, the facility shall clearly acknowledge that the admission is inappropriate and initiate plans to actively explore alternatives;
>
> (d) Before admission, the resident and a responsible member of his family or committee shall be informed in writing of the established policies of the facility and fees, reimbursement, visitation rights during serious illness, visiting hours, type of diets offered and services offered; and
>
> (e) The facility shall provide and maintain a system for identifying each resident's personal property and facilities for safekeeping of his declared valuables. Each resident's clothing and other property shall be reserved for his own use.
>
> (2) Discharge planning. Prior to discharge the facility shall have a postinstitutional plan which identifies the residential setting and support services which would enable the resident to live in a less restrictive alternative to the current setting. Before a resident is released, the facility shall:
>
> (a) Offer counseling to parents or guardians who request the release of a resident concerning the advantage and disadvantages of the release;
>
> (b) Plan for release of the resident, to assure that appropriate services are available in the resident's new environment, including protective supervision and other followup services; and
>
> (c) Prepare and place in the resident's record a summary of findings, progress, and plans.

Finally, the amendments define the "interdisciplinary team" as:

> the group of persons responsible for the diagnosis, evaluation and individualized program planning and service implementation for the resident. The team is composed of a physician, a psychologist, a registered nurse, a social worker, and other professionals, at least one (1) of whom is a qualified mental health professional, and may include the resident, the resident's family, or the guardian.

It will be recalled that, with regard to the statutory scheme in effect from 1982 until 1986, the previous opinion of the Court held that because it granted equal due process rights prior to involuntary commitment to both mentally retarded and mentally ill persons, the Commonwealth could not apply the statutes in a different way to these two classes of persons and thereby deprive the mentally retarded of their equal protection rights. That decision also held that it could not be a violation of the due process rights of mentally retarded persons for the state to commit such persons to mentally retarded institutions (hereinafter MRI) without a judicial hearing.

The Court, in that portion of the opinion relating to due process, relied heavily upon the decision of the Supreme Court in *Parham* v. *J.R.*, 442 U.S. 584 (1979). However, we have re-examined the case of *Clark* v. *Cohen*, 613 F. Supp. 684 (M.D. Pa. 1985) and its predecessor, *Dixon* v. *Attorney General of Commonwealth of Pa.*, 325 F. Supp. 966 (M.D. Pa. 1971), and now reach the contrary conclusion that it would be a violation of due process for Kentucky to involuntarily commit a mentally retarded person who is eighteen years of age or over without first awarding him a judicial hearing. Our opinion in this regard is strengthened by the very thorough analysis which District Judge Huyett undertook in *Clark* v. *Cohen*, *supra*, to show that there are indeed significant differences between the due process rights of adult mentally retarded persons and the rights of juveniles in a similar position. *Id.*, 613 F. Supp. at 697 *et seq.* As Judge Huyett noted,

> *Parham* dealt only with the commitment of minors by their parents or legal guardians. The Court's decision rested very heavily on the assumption that both parents and guardians act in the best interests of the child and that both have traditional authority over the raising of minors in their care. This aspect of *Parham* makes it inapposite to a situation involving someone who is not a minor. Once someone becomes an adult, one's parents lose that degree of authority found so crucial in *Parham*. Moreover, as even the *Parham* court found, there is a possibility (born[e] out by this case) that a 'ward' of the state who is committed may become 'lost in the shuffle.' *Id.* at 699, *citing Parham*, 442 U.S. at 619.

While an involuntary commitment to an MRI may be the most humane solution for a profoundly or severely retarded mentally retarded person who is unable to care for him or herself, it is still apparent that such commitment results in an extreme curtailment of personal liberty. Any decision by the state which results in such a profound deprivation of personal liberty must be accompanied by substantial due process safeguards, particularly where the person who is to be committed may be lacking in the ability to fully protect his or her procedural rights. We therefore hold that mentally retarded persons over eighteen years of age are entitled to a judicial hearing and determination of the propriety of commitment, either prior to being involuntarily committed to an MRI or other facility, or as soon as practicable thereafter.

This holding applies equally to persons who are sought to be committed for the first time after they are eighteen and those who have been in the MRI prior to reaching eighteen but who then reach the age of eighteen. Of course, the state has the right to commit minors under the procedures that are now available under the statute and under the decision in *Parham*.

We also disagree with the statute's definition of what constitutes an "involuntary commitment." K.R.S. 202B.-040(5) treats the application by parents or guardians for placement of their retarded family member or ward in any mental retardation center as voluntary, and thereby strips the mentally retarded adult of his or her right to a *judicial* hearing and determination prior to commitment. As noted by this Court in *Kentucky Ass'n for Retarded Citizens* v.

Conn., 510 F. Supp. 1233 (1980), *aff'd* 674 F. 2d 582 (6th Cir.), *cert. denied* 459 U. S. 1041 (1982), many retarded adults are placed in MRI's by state appointed guardians who have no family ties with the mentally retarded person, and, even in those cases where the mentally retarded person is sought to be placed in an MRI by a relative or person who is also his legal guardian, the label of "voluntary commitment" cannot stand up in the face of the fact that the mentally retarded person is being committed without his or her consent. *Conn, supra,* 510 F. Supp. at 1248-49.

With regard to the equal protection argument, it is true that courts have stated that there are significant differences between the mentally ill and the mentally retarded. *See Kremens* v. *Bartley,* 431 U.S. 119, 135-36 (1977). However, the fact that there are significant differences between the mentally ill and the mentally retarded does not ease the principle that mentally ill persons and mentally retarded persons are in similar positions: each has a fundamental constitutional right not to be placed in an institution until a judicial hearing has taken place, and appropriate findings have been made that they pose a danger, or threat of danger, to self or others, and have met the other requirements set out in the statutes. *See* K.R.S. 202B.040 (mentally retarded); K.R.S. 202A.026 (mentally ill).

The statute, K.R.S. 202B, specifically requires that where a person who is alleged to be mentally retarded is involuntarily committed, the following determination shall be made: that he is mentally retarded, presents a danger or threat of danger to himself or others; that the least restrictive alternative mode of treatment is in a hospital or mental retardation residence treatment center; and that treatment that can reasonably benefit the individual is available in the hospital or mental retardation treatment center. K.R.S. 202B.040 (1986). The statute, however, does not

explicitly prescribe who makes the ultimate determination as to whether these criteria have been met. It does provide that patients shall be admitted only on the approval of a physician. K.R.S. 202B.045(1)(a). It also requires evaluation by the interdisciplinary team. K.R.S. 202B.010(1) and 202B.045. The statute, as amended, apparently even retains the requirements that the Secretary consent to the mentally retarded individual's commitment. K.R.S. 202B.-030. However, the statute no longer grants mentally retarded persons the right, granted to mentally ill persons under K.R.S. 202A.051, of having a judicial determination made as to the propriety of their involuntary commitment. *See* K.R.S. 202B.050 (1986). K.R.S. 202B therefore violates the equal protection clause because there is no rational basis for distinguishing between the mentally retarded and the mentally ill with regard to their initial involuntary confinement. Both categories of persons who are eighteen years of age or over must receive a judicial hearing.

We next come to the question of what significance the difference between mentally retarded and mentally ill persons entails insofar as it affects their right to periodic review of their commitment. The present law grants the mentally ill person the right of judicial review at least every 360 days after he or she has reached adulthood because he or she cannot be committed for a longer period. K.R.S. 202A.051 (1986). However, the present law does not grant the mentally retarded person judicial review of his or her indefinite commitment. In this connection, it is recognized that mentally ill persons may recover from their mental illnesses within relatively short periods after their judicial commitment, whereas severely and profoundly mentally retarded persons very rarely experience such dramatic improvements in their condition. This fundamental difference seems to indicate that the state could prescribe different modes of due process for the review of the commitment of severely and profoundly mentally retarded adults versus the review of the commitment of mentally ill adults. However, it is not our duty to spell out at the juncture what such due process procedures might be, and we have not yet been cited to any statute or decision which the parties contend controls the review rights of the mentally retarded adults.

Our only function at this time is to hold that there must be some judicial review, at some appropriate time, of the commitment of persons who are eighteen years or older and who are mentally retarded. Suffice it to say that the statute, as it now stands, is unconstitutional with respect to the right to a judicial hearing of mentally retarded adults prior to their involuntary commitment. *Clark* v. *Cohen*, 613 F. Supp. 684 (M.D. Pa. 1985).

We have this day entered a preliminary injunction and partial summary judgment in accordance with our opinion.
Dated 11-20-86

(s) Charles M. Allen
Charles M. Allen, Senior Judge

cc: Counsel of Record

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C 82-0738-L(A)

SAMUEL DOE, et al., - - - - - - *Plaintiffs,*

v.

ELBERT AUSTIN, Secretary, Cabinet for
Human Resources, - - - - - *Defendant.*

PRELIMINARY INJUNCTION AND PARTIAL SUMMARY JUDGMENT

Plaintiffs having moved for a preliminary injunction and summary judgment, and defendant having moved the Court to reconsider its opinion and partial summary judgment of January 9, 1986, and the parties having fully briefed the issues, and the Court being of the opinion that a hearing is unnecessary on the motion for a preliminary injuction,

IT IS ORDERED AND ADJUDGED as follows:

1. Defendants are enjoined from committing to a mentally retarded treatment center, or any other facility for treatment of the mentally retarded, any allegedly mentally retarded person who is over eighteen years of age without first granting him or her a judicial hearing to determine whether or not he or she should be committed under the standards set out in K.R.S. 202B.040(1-4). Defendants are likewise enjoined from continuing to confine any allegedly mentally retarded person in any such institution after he or she has reached his or her eighteenth birthday, unless there

is a judicial hearing and a judicial determination made that the standards set out in K.R.S. 202B.040(1-4) have been met. Such judicial hearing shall take place not later than three months after the person already committed has reached the age of eighteen years. The confined mentally retarded person referred to in the preceding two sentences may continue to be confined between the time such person attains the age of eighteen years and the time he or she receives the required judicial hearing. Plaintiffs shall give security in the amount of $100.00. Rule 65(c), Fed. R. Civ. Pro.

2. Plaintiffs are further granted partial summary judgment on the issue of the unconstitutionality of K.R.S. Chapter 202B, as amended, such statute being in violation of the due process and equal protection rights of the Plaintiff as set forth in the accompanying memorandum opinion.

3. The parties shall have sixty (60) days from the date of this order in which to meet and confer for the purpose of submitting to the Court an agreed compliance plan for the provision of judicial proceedings in accordance with the opinion entered this day.

Dated 11-20-86

(s) Charles M. Allen
Charles M. Allen, Senior Judge

cc: Counsel of Record

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C 82-0738-L(A)

Samuel Doe, et al., - - - - - - *Plaintiffs,*

v.

Elbert Austin, Secretary, Cabinet for Human Resources, et al., - - - *Defendants.*

MEMORANDUM OPINION

This action is submitted to the Court on the plaintiffs' motion for reconsideration pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. Plaintiffs seek reconsideration of that portion of this Court's March 28, 1984, memorandum opinion and order which denied plaintiffs' claims regarding the admissions process to Mental Retardation Residential Treatment Centers [hereinafter "MRRTC"]. More specifically, plaintiffs' motion requests the Court to make available to the mentally retarded the procedural protections established for them by state statute. Defendants, on the other hand, move for partial summary judgment in their favor on the same issue.

The record reveals that approximately 800 mentally retarded persons are confined in MRRTC's. Of these 800 persons, 100 are moderately or mildly retarded, 222 are severely retarded, and 487 are profoundly retarded. Plaintiff, Samuel Doe, was placed at the Outwood State Hospital at the age of eighteen under the authority, care and custody of the Secretary of the Kentucky Cabinet [formerly "Department"] for Human Resources. Several years after he had become a resident, he was adjudicated incompetent in 1976 at the initiation of the state. Soon thereafter, his mother, Mary Doe, was appointed legal guardian. He now has been subjected to confinement for over thirteen years.

The record also reveals that the criteria for admission to a mental retardation facility is determined by (a) the availability of appropriate alternate residence and training programs in the community, (b) the availability af appropriate living and training space within the recommended section, (c) the severity of the applicant's handicap, and (d) the status of the family situation. In addition, it is the custom of the defendants to consider an admission voluntary if the retarded person signs what is known as a bill of rights form. The record reveals that if the retarded person is unable to understand the procedures of admission, the procedure is explained to the family accompanying him. If the family agrees to it, and if the individual signs the application with an x or is able in any other way to let the defendants know whether he or she wants to be admitted, then that individual is considered a voluntary admission.

The record further reveals that no civil proceedings with regard to admissions have been instituted. The defendants consider this appropriate because they believe that nearly all admissions are voluntary rather than involuntary. The record also reveals that only two court proceedings have taken place with reference to a resident's request for release.

The plaintiffs' brief in support of reconsideration points out that this Court, in effect, previously focused erroneously on the constitutionality of the defendants' informal admission system rather than on the constitutionality of the class members' exclusion from the statutory system provided by KRS 202B. Plaintiffs emphasize that they are not

challenging the constitutionality of KRS 202A or 202B, but rather, are challenging the rights of the state under due process and equal protection considerations. Likewise, plaintiffs correctly note that in *Kentucky Association for Retarded Citizens* v. *Conn*, 510 F. Supp. 1233 (W.D. Ky. 1980), *aff'd* 674 F. 2d 582 (6th Cir.), *cert. denied*, 459 U.S. 1041 (1982), this Court held that the great majority of profoundly and severely mentally retarded persons are simply incapable of making decisions as to whether it is in their best interest to be placed in a MRRTC.

In light of the holdings in *Parham* v. *J.R.*, 442 U.S. 584 (1979), and *Secretary of Public Health of Pennsylvania* v. *Institutionalized Juveniles*, 442 U.S. 640 (1979), we have little doubt that the state may constitutionally provide for the admission of mentally retarded persons, at least with respect to minority patients, the informal procedures which are now used by the state in admitting nearly all patients. However, in the instant case, the Commonwealth of Kentucky did not choose to legislate for procedures similar to those discussed in *Parham* and *Institutionalized Juveniles*. Instead, the legislature chose to guarantee to mentally retarded persons all of the rights guaranteed to mentally ill persons by KRS 202A and 210. Having created these due process rights, the question is whether the state may deny them by resorting to practices and procedures which are not in accord with the practices and procdures afforded to mentally ill persons.

As previously mentioned, plaintiffs are attacking the defendants' informal procedures as a violation of due process and equal protection. With respect to due process, plaintiffs rely, *inter alia*, on *Cleveland Board of Education* v. *Loudermill*, 105 S. Ct. 1487 (1985), *Mills* v. *Rogers*, 457 U.S. 291 (1982), and *Vitek* v. *Jones*, 445 U.S. 480 (1980), as well as this Court's opinion in *Kare*, for the proposition that once the mentally retarded have a liberty interest created by the state, the state cannot extinguish it by failing to follow its own legislative due process procedures. While this Court believes that the plaintiffs have been granted a liberty interest by KRS 202A and 202B as well as by the holdings in *Youngberg* v. *Romeo*, 457 U.S. 307 (1982), *Vitek* v. *Jones*, *Kare*, and *Association for Retarded Citizens* v. *Olson*, 561 F. Supp. 473 (D. N.D. 1982), none of the Plaintiffs' cases on due process issue reached the result contended for by the plaintiffs, viz., what due process should be extended to the plaintiffs once a court has reached the conclusion that they possess a state created liberty interest.

In *Vitek* v. *Jones*, although the Court approved of the specific due process procedures set out by the district court, it did not in any way state that these procedures were the same as those set out for non-prisoners who were involuntarily confined to a mental hospital. In *Loudermill*, the Court stated that "once it is determined that the Due Process Clause applies, 'the question remains what process is due.'" 105 S. Ct. at 1493 (quoting *Morrissey* v. *Brewer*, 408 U.S. 471 (1972). The answer to that question, according to the Court, was "not to be found in the Ohio statute." *Id.*

In conclusion, we believe that although a liberty interest is created in the plaintiffs with regard to so-called voluntary admissions, the procedures followed by the state are sufficiently analogous to those followed in *Parham* and *Institutionalized Juveniles* to meet the requirements of procedural due process.

Although the plaintiffs cannot prevail upon the due process issue, they do prevail upon the equal protection issue. Kentucky has explicitly provided that mentally retarded persons shall have the same due process rights as mentally ill persons. In *Baxstrom* v. *Herold*, 383 U.S. 107 (1966), a prisoner named Baxstrom was certified as insane by a prison physician and transferred to a prison mental hospital. Later, when his penal sentence was about to expire, the State of New York civilly committed him following a proceeding in the chambers of a Surrogate, at which Baxstrom appeared alone. Medical certificates were filed by the state and indicated that two examining physicians believed Baxstrom was still mentally ill and in need of institutional care. The Surrogate signed a certificate which indicated he was satisfied that Baxstrom would require care and treatment in an institution for the mentally ill. Following that hearing, Baxstrom was retained at the state prison mental institution.

Under New York law, all persons civilly committed because of mental illness were granted to right to a jury trial, except those who were committed at the expiration of a penal term. The Supreme Court held that Baxstrom's equal protection rights were violated because all persons who were mentally ill should have been granted the right to a jury trial and no rational basis existed for distinguishing between persons who had been confined in prison and those who had not been so confined. The Court also held that the state did not have the right to deny Baxstrom a judicial proceeding to determine whether he was dangerous and should be confined in a prison rather than in a civil mental institution.

In *Jackson* v. *Indiana*, 406 U.S. 715 (1972), Jackson was a mentally defective person who had been charged with two robberies. After a competency hearing was held by the court to determine whether Jackson could stand trial, the court ordered him committed to the Department of Mental Health until such time as the department would certify that he was sane.

The Supreme Court held that Jackson was deprived of equal protection because the Indiana statutes for commitment of mentally ill or "feeble-minded" persons afforded protections which were not available or granted to Jackson when he was committed under Indiana's pretrial commitment statute for incompetent criminal defendants. Under this statute, a court could find that a person was incompetent to stand trial and therefore should be confined to a mental institution without any statutory provision for periodic review of the defendant's condition or opportunity for release. In the words of the Court, "by subjecting Jackson to a more lenient commitment standard and to a more stringent standard of release that those generally applicable to all others not charged with offenses, and by condemning him to permanent institutionalization without the showing required for commitment or the opportunity for release afforded by [Indiana's other two commitment statutes], Indiana deprived [Jackson] of equal protection of the laws under the Fourteenth Amendment." *Id.* at 730.

Here Kentucky has decreed by legislative fiat that the mentally ill and the mentally retarded are to be treated alike with minor exceptions. Having declared that they shall be treated in the same manner, we believe that it is a violation of equal protection for the defendants to treat them differently.

The problem in the case at bar is created primarily by the legislature's sweeping determination in KRS 202B.050, which states that "[a]ll rights guaranteed by KRS Chapters 202A and 210 to mentally ill persons shall apply to mentally retarded persons." With this provision in mind, we must examine the provisions of KRS 202A and compare them with the practices and procedures of the defendants in construing Chapter 202B.

KRS 202A.021 provides that an authorized staff physician may admit for observation, diagnosis, care and treatment any person who is mentally ill or who has symptoms of mental illness and who applies voluntarily therefor. The practice followed by the defendants allows voluntary admissions for mentally retarded persons as previously outlined. These procedures are analogous to the procedures which the state defendants follow in admitting mentally retarded persons whom they contend are voluntarily committed. Also, the provisions contained in KRS 202A.021(1) allow children under eighteen who are mentally ill or who have symptoms of mental illness to be admitted provided the child's parents or guardian apply for admission and sign the application in the presence of two witnesses. A child fourteen years of age or older may admit himself or herself to a hospital for evaluation with the consent of a treating or admitting physician, provided that the child's parents or legal guardian are notified immediately of the admission and of their right to seek discharge.

We believe that insofar as mentally retarded persons under eighteen years of age are concerned, they are granted substantially the same rights by the defendants in the practices and procedures which they now follow. In other words, they are admitted upon the application of their parents or guardian and upon the recommendation of the Records Review Committee, which includes at least one psychiatrist.

We also believe that the defendants may admit mentally retarded person who are mildly or moderately retarded and who are over eighteen where those persons in their individual capacities make an application to be admitted to a mental retardation facility, but not in those instances where the application is made by parents, guardians, committee or at the instance of the state.

Finally, we believe that as to those persons who are profoundly or severely retarded and who are over the age of eighteen, the state defendants may not follow the procedures now used. Those persons must be considered as involuntarily committed even though the procedure now followed is called a voluntary admission and even though the so-called voluntary admittee signs the form prescribed by the state defendants. All of these persons, regardless of the wishes of their parents, guardians or the RRC, are entitled to the privileges set out in KRS 202B.040 and may not be committed unless a court makes the determinations required under that statute.

While KRS 202B does not delineate the specifics as to how and when the determination is to be made, KRS 202A.041 requires a preliminary hearing by the court within five days from the date of arrest of a suspected mentally ill person and then a final hearing within twenty-one days of the date of arrest to determine if the person should be involuntarily hospitalized for a period of sixty days. In addition, KRS 202A.071 and .076 require a preliminary hearing not less than six days from the date of the mentally ill person's detention and a final hearing with twenty-one days from the date of detention with a jury unless the mentally ill person and his or her attorney waive the right to a jury trial.

It is of course obvious that the great majority of mentally retarded persons who are profoundly or severely retarded are not brought for admission to MRRTCs as the result of an arrest. However, as it is typically the decision of parents or guardian to have the mentally retarded person admitted and as that decision then triggers the application procedure, it would seem that the date of application and actual admission, which are usually the same, should be considered as analogous to the date on which arrest occurs in the case of a mentally ill person. With that in mind, it would seem that in order to provide equal protection to the profoundly and severely retarded, the procedures set out in KRS 202A.071 and .076 must be followed.

The plaintiffs have wisely recognized that it will not be easy for the defendants to meet immediately the burdens which this decision places upon them. Therefore, the Court believes that the plaintiffs' suggestion of a sixty day continuance should be granted in order for the parties to work out the details of the procedures to be followed for profoundly and severely retarded persons who are over eigthteen years of age.

Finally, we note defendants' argument that any orders entered by the Court requiring them to follow the state procedures advocated by the plaintiffs would result in a violation of the Supreme Courts mandate in *Pennhurst State School and Hosp. v. Halderman*, 465 U.S. 89 (1984). *Pennhurst* holds that a federal court may not grant injunctive relief against state officials on the basis of state law, whether prospective or retroactive. In interpreting the Eleventh Amendment, the Court stated:

> A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. *Id.* at 106.

In the case at bar, it is true that the state defendants are not following the dictates of their own statutes. However, this Court's grant of relief is not predicated upon that finding, but rather upon the constitutional principle of equal protection, that is, that a state may not deprive its citizens of the equal protection of its laws by unevenly and discriminatorily applying them.

Therefore, we have this day entered a partial summary judgment in accordance with this opinion.

Dated January 9, 1986

(s) Charles M. Allen
Charles M. Allen, Senior Judge

cc: Counsel of Record

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C 82-0738-L(A)

SAMUEL DOE, et al., - - - - - - *Plaintiffs,*

v.

BUDDY ADAMS, and
JACK FARLEY, - - - - - - - *Defendants.*

FINDINGS OF FACT, CONCLUSIONS OF LAW AND MEMORANDUM OPINION

This case is submitted to the Court on the motion of the plaintiff, Samuel Doe, for partial summary judgment against defendant Buddy Adams. Plaintiff is a mentally retarded person who has been institutionalized at Outwood for over ten years.

This action was brought on his behalf by his mother and next friend who contends that the defendant has refused to make available the pre-commitment and post-commitment procedural safeguards guaranteed under KRS 202A and 202B. More specifically, plaintiff alleges that every mentally retarded person who is committed to a Mental Retardation Residential Treatment Center (hereinafter MRRTC) may not be committed without a determination that he is mentally retarded, that he is a danger to himself or others, and that the least restrictive mode of treatment for that person requires placement in a hospital, institution or other MRRTC.

The complaint notes that KRS 202B.050 provides: "All rights guaranteed by KRS Chapter [ ] 202A . . . to mentally ill persons shall apply to mentally retarded persons." Plaintiff further contends that defendant has complied with the provisions of KRS 202A, 203 and 902 KAR 12.010, insofar as the mentally ill are concerned, but has denied the mentally retarded those rights.

Plaintiff also contends that he has been denied his rights under the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment as well as his rights under 29 U.S.C. §794, KRS 202A, KRS 202B, KRS 210, and KRS 31.

Extensive depositions have been taken by the plaintiff and established without contradiction that the mentally retarded, whether admitted by their parents or by a guardian related to them, or by a statutory guardian who is not related to them are admitted to the MRRTC without the benefit of any court hearing. Instead, upon the decision made by the defendant that the person for whom admission is sought is mentally retarded, such a person is admitted.

The undisputed evidence reflects that in the past few years, in only three cases concerning mentally retarded persons was a civil commitment proceeding instituted, and only one case in the last year. It is also known that approximately 1,100 petitions for involuntary commitment of mentally ill persons are filed yearly in Jefferson County alone; but since July 1982, not one case involving a mentally retarded person has been subject to the KRS 202B procedure.

The written admissions' policy of the defendant conditions admission on (a) the availability of appropriate alternative residential and training programs in the community, (b) the availability of appropriate training and living space within the recommended facility, (c) the severity of the applicant's handicap, and (d) the status of the family situation. These standards of admissibility are administered by the Records Review Committee (hereinafter RRC), a committee composed of various state employees, one of whom is a psychiatrist, with Dr. Susan Turner as chairperson for the past four years.

With respect to the confinement and release of persons placed in a MRRTC, it appears that the defendant, as a result of pressures from some parents of mentally retarded persons, has instituted an unwritten policy which gives to the parents of a mentally retarded person an absolute veto power the decision of the Committee, appointed by the MRRTC, to determine whether a mentally retarded person is suitable for release from a state MRRTC facility to alternative community placement.

This case is a sequel to *Kentucky Association For Retarded Citizens v. Conn,* 510 F. Supp. 1233 (W.D. Ky. 1980), *aff'd,* 674 F. 2d 582 (6th Cir. 1982), *cert. denied sub. nom., Bruington v. Conn,* —— U.S. ——, 103 S.Ct. 457 (1982). In *Conn,* among other holdings, the Court held that persons who are confined at MRRTC, Outwood, are, in fact, involuntary admissions with the exception of those very few who made their own applications to be admitted, and are entitled to the least restrictive alternative mode of treatment. *Id.* at 1235; 1249. We did not reach in that case, however, the question of whether a mentally retarded person had to go through a civil commitment proceeding prior to confinement in Outwood or in any other MRRTC.

Plaintiff contends, with regard to the admissions' policy of the defendants, that all persons who are in MRRTCs are involuntarily committed and that they must be accorded the same rights as are accorded to involuntarily committed mentally ill persons under the provision of KRS 202A. More specifically, plaintiff contends that no mentally retarded persons may be committed except under KRS 202B.040, and that once a person is committed, there must be reauthorization of commitment at least every 360 days;

and further that if, at any time, the resident no longer meets the standards of commitment, he is entitled to release.

To bolster that contention, plaintiff argues that the doctrine of collateral estoppel must be applied to our holding in *Kentucky Association For Retarded Citizens v. Conn, supra,* and that every person in a MRRTC is involuntarily committed. Plaintiff also relies upon the provisions of KRS 202B.050 which provides that all rights guaranteed by KRS 202A and 210 to mentally ill persons shall apply to mentally retarded persons.

We proceed first to resolution of the collateral estoppel issue. The leading case on that issue is that of *Parklane Hosiery Co., Inc. v. Shore,* 439 U.S. 322 (1979), where the Supreme Court held that a party who had issues of fact adjudicated adversely to it in an equitable action could be collaterally estopped from relitigating the same issues before a jury in a subsequent legal action brought against it by a new party. In *Parklane,* the Supreme Court noted that collateral estoppel could only be applied against parties who had a "full and fair" opportunity to litigate their claims. *Id.* at 332.

Since *Parklane, supra, Hardy v. Johns-Manville Sales Corporation,* 681 F.2d 334 (5th Cir. 1982), states that in order for collateral estoppel to be invoked, the issue to be concluded must be identical to that in the prior action, it must have been actually litigated, and the determintion made in the issue in the prior action must have been necessary and essential to the resulting judgment. *Id.* at 341.

Further, as stated in *Hardy* at 341, "[i]f it appears that a judgment may have been based on more than one of several distinctive matters in litigation and there is no indication which issue it was based on or which issue was fully litigated, such judgment will not preclude, under the doctrine of collateral estoppel, relitigation of any of the issues." (citing authorities).

In *Conn, supra*, the plaintiffs sought to prevent the defendants from constructing a new facility for 175 mentally retarded citizens. They also alleged violations of the Fourteenth Amendment by denial of the "right to treatment, right to the least restrictive alternative, and right to freedom from harm." *Id.* at 1237. At 1247, 48-49, the Court was concerned with the question of whether state law forbid the construction of the new Outwood; and if it did not, what were the rights of those people who would be residents of the new Outwood or who were residents of the old Outwood.

After holding that Kentucky did not ban the use of construction of new facilities for the treatment and care of mentally retarded persons, the Court went on the analyze the rights of persons who would be or who were confined at Outwood. We noted that KRS 202B.040 provided for a court determination before any person who was mentally retarded could be involuntarily committed. On pp. 1248 and 1249, the Court stated its belief that commitments of mentally retarded persons who were confined at Outwood were, in fact, involuntarily confined, with the exception of those very few who made their own applications to be admitted. The Court went on to hold that those few who were truly voluntary residents were entitled to release on their own requests.

In the judgment, the Court specifically declared that each resident confined at Outwood or to be confined at the new Outwood would be considered to be involuntarily committed, with the exception of those adult individuals who applied voluntarily. The judgment went on to state that the voluntarily confined residents were entitled to be discharged upon their application for discharge, and that the other residents were entitled to seek relief from actions approved by their guardians or committees for or against admission and discharge. *Id.* at 1235.

The Court went on to state in the judgment that each resident committed by the action of a guardian or committee is entitled to the rights set out in K.R.S. 220B.040 and 202B.060, and to release where a determination is made by an interdisciplinary team that the resident presents no immediate danger or threat of danger to self or others, and where the least restrictive alternative mode of treatment is in a living facility, and where there is in existence such a facility which can adequately treat and supervise the residents. *Id.* at 1235.

The Court has reviewed the briefs of the parties and in applying the doctrine of collateral estoppel, we note that the issue raised in the case at bar, relative to the allegedly improper admission of mental retarded persons, is not identical to the issue raised in *Conn*, and which the Court discussed, which was the right to the least restrictive alternative mode of treatment.

It is noted at p. 1248, the Court was basically concerned with involuntary commitment in the context of the right to the least restrictive mode of treatment. The Court did not specifically determine that all mentally retarded persons were entitled to the protections associated to involuntarily committed mentally ill persons, or the protections set out in KRS 202B.040; but simply reached the decision that there was no merit to the argument made by the defendants that retarded persons were voluntary residents of MRRTCs and were not entitled to the least restrictive mode of treatment.

Beliving that collateral estoppel does not bar the Court from an independant determination as to what the rights of mentally retarded persons are in the context of their admission to MRRTCs, we hold first that KRS 202B.050 and KRS 202B.020 mandate that hospitalization for the care and treatment of mentally retarded persons are to be provided in the same manner as hospitalization of mentally ill persons, as set forth in KRS 387, 210, 202A.020, 202A.231 and 202A.201; except that when a court appoints persons to examine allegedly mentally retarded persons, such persons, where possible, shall have made a study of mental retardation. Also, there is an exception that a qualified mental retardation professional may be substituted for one, but not both positions when certification is required for involuntary hospitalization. See KRS 220B.020.

KRS 202A.021 speaks in terms of voluntary admissions and allows any adult to be voluntarily admitted to a hospital upon his own application by an authorized physician. Any unemancipated person under 18 may be admitted to a mental hospital following his application signed by parent or guardian. Any child between the ages of 14 and 18 may admit himself or herself to a mental hospital, provided that the child's parents or legal guardian are notified immediately of the admission.

KRS 202A.021, (2), (3), and (4) allow a physician to discharge any voluntary patient, including anyone under 18 years of age, whose hospitalization he believes to be no longer necessary. In the alternative, if the voluntary patient requests release, or if a child represented by a parent or committee requests release, or has a release requested by his parent or committee, he must be released unless further detained under other provisions of the statute. Also, at any time during the period of hospitalization, either the child or his parents or legal guardian may seek an independent medical review of the appropriateness of the decision to continue his confinement or to release him.

Since KRS 202B.020 specifically provides for hospitalization of mentally retarded persons by the same procedures as those set out in KRS 202A.021, it is readily apparent that any mentally retarded person under 18 years of age may be admitted by his parents or guardian, and

that such admission in the eyes of the Legislature was to be treated as analogous to a voluntary admission.

We note in this connection that in the case of *Secretary of Public Welfare of Pennsylvania* v. *Institutionalized Juveniles*, 442 U.S. 640 (1979), the Supreme Court described the placing of mentally retarded and mentally ill children under 18 by application of their parents or guardians as being application for voluntary commitment. *Id.* 646, 47.

Our conclusion that the Legislature did not intend that all mentally retarded persons who were placed in MRRTCs should be considered as being involuntarily committed is fortified by the fact that KRS 202B.040 specifically refers to the due process procedures to be followed in the event of a mentally retarded person who was involuntarily committed. That section tracks the language found in KRS 202A.026. When KRS 202B.040 is considered, along with KRS 202B.020 and KRS 202A.021, it is apparent that the Legislature wished to differentiate between persons admitted by their parents and/or guardians and those persons whom the authorities felt, for some reason, should be hospitalized in a MRRTC in the absence of an application by the guardian, committee or parents.

Analyzing further KRS 202A.021, it is significant to note that the only restrictions placed upon the admission of a child whose application is signed by a parent or guardian is that an authorized staff physician must grant permission for the admission. The statute then makes ample provision for the due process rights of the mentally ill person to be discharged at any time, since that decision may be accomplished by either the decision of a physician or the decision of the parents or guardian, unless the hospital authorities think release inadvisable, in which case the provisions for involuntary confinement are brought into play.

We conclude, with respect to admissions, that the defendants are not violating the Equal Protection Clause of the Fourteenth Amendment. The mentally retarded person or child may not be confined in a MRRTC without the approval of an Admissions Committee, which must consider the four criteria for admissions referred to on pages 2 and 3 of this opinion. Since that Committee has as one of its employees a psychiatrist, we believe that admission by it may be considered as equivalent to the admission of mentally ill persons by an authorized staff physician.

The Court notes that the only standard imposed upon the staff physician in KRS 202A.021 inferentially is that the person who has applied for admission is mentally ill or has symptoms of mental illness. While we would prefer, in light of *Parham v. J. R., supra*, that the committee be composed entirely of physicians, we note that in *Secy. of Public Welfare v. Institutionalized Juveniles, supra*, the mentally retarded children are admitted to the hospital on the application of parents or guardian, and the referral of a physician, accompanied by a medical or psychological evaluation. The Pennsylvania statute then goes on to place upon the Director of the hospital the duty of making an independent examination of the child; and if he disagrees with the referring physician, the child must be discharged. If the child is admitted, then a staff conference is held and it is decided whether or not the child needs hospitalization.

Finally, we note that there is a class of mentally retarded persons who are, generally speaking, adults and who are committed to MRRTC's upon the application a State-appointed guardian, such as Maxine Pulliam. See *Conn, supra*, referring to the fact that 155 persons were admitted to Outwood as a result of an application filed by Maxine Pulliam, an employee of the State. The Supreme Court addressed this problem in *Parham, supra*, at pp. 617-19, where they stated that although there are differences in the situation of persons who are wards of the State at the time of admission, as contrasted with the situation of children who have natural parents requesting admission, these differences are not so great as to require different procedures at the time of the child's initial admission to the hospital. The Court went on to state that there was no evidence that the State's application for admission was submitted for reasons unrelated to the child's need for treatment. *Id.* at 618.

We note the similarities between the procedures now employed by the defendants for the admission of mentally retarded persons and those employed for the voluntary admission of adults and children as provided in KRS 202A.021, KRS 202B.020 and KRS 202B.050.

We note also that KRS 202A.171 requires the discharge of an involuntary patient when he no longer meets the criteria for involuntary hospitalization. No specific reference is made in KRS 202B.020 and KRS 202A.171. However, since KRS 202B.050 guarantees the rights of KRS 202A to mentally retarded persons, it follows that an involuntary mentally retarded person must be discharged when he no longer meets the criteria for confinement set out in KRS 202B.040. Again, that type of proceeding and relief would apply only to the very small number of mentally retarded persons who are not admitted by the application of either a natural parent or a guardian and would not apply to the great majority who are considered to be voluntarily confined.

Finally, we note that the policy of the defendant, allowing parents an absolute veto power over the decision of the Release Committee to place a mentally retarded person in the community, is in conflict with the holding in *Parham v. J.R., supra*. In *Parham*, the Court held that its prece-

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dent allowed parents to retain a substantial, if not dominant, role in the decision to voluntarily admit their children to mental hospitals. The Court also concluded that the child's rights and the nature of the commitment decision are such that the parents cannot always have absolute and unreviewable discretion in deciding whether to have a child institutionalized. Of course, they retain plenary authority to seek such care for their children, subject to a doctor's independent examination and medical judgment. See 442 U.S. at 604.

The amicus curiae relies upon the most recent decision in *Halderman* v. *Pennhurst State School & Hospital*, 707 F. 2d 702 (3rd Cir. 1983). In that case, a two-to-one decision was entered holding that the district court erred when it held that a mentally retarded person could be transferred from Pennhurst, the state institution for the mentally retarded, where he had resided for over nine years, to a community living arrangement (hereinafter CLA). The district court had mandated that individual habilitation plans (IHP's) be developed supporting the transfer of Pennhurst school age residents to CLAs. Parents were allowed to participate as members of their child's IHP team, but parental consent to a transfer was not required. The IHP was to be submitted first to a court-appointed master; and if the parents objected to the recommendations of the IHP, they could demand a hearing to determine whether the Pennhurst arrangements were more beneficial to the resident's habitation than the living arrangements in the community. The master would then make a report which could be excepted to by the parents and then heard by the district court.

Circuit Judge Aldisert, who wrote the majority opinion, held that the "district court did not afford to the parents' views the consideration that the Constitution demands." *Id.* at 711. Judge Aldisert stated that parents have a substantial right to direct the upbringing of their minor children, which can only be overcome either by a showing of abuse or neglect or by proof of a significant governmental interest running counter to the express parental desires. He then went on to hold that since there was evidence, both for and against the transfer decision, there was insufficient proof of a significant governmental interest to negate the parents' substantial constitutional rights. *Id.* at 710.

Circuit Judge Rosenn, in his concuring opinion, stated that he believed that when "parents' interests clearly collided with the interest of their minor child, whatever authority parents may ordinarily possess is necessarily subordinated to the child's best interest, notwithstanding the recognized right of parents in the well being of their children." *Id.* at 712.

Judge Rosenn went on to hold that although the parents did not have an absolute right in the case, the master should have ordered a transfer only if there were a compelling justification for the transfer. He based his opinion, in part, upon the discussion in *Parham* v. *J. R.*, *supra*, to the effect that there is a fundamental presumption that parents act in the best interest of their children, quoting *Parham*, 442 U.S. at 602.

In his dissenting opinion, Circuit Judge Sloviter pointed out that where the parents have voluntarily relinquished custody of a child to a mental retardation facility, the parental constitutional right referred to by Judge Aldisert could not govern the decision in *Halderman*, *supra*. He also pointed out that *Parham*, *supra*, requires some kind of inquiry by a neutral fact finder to determine whether the statutory requirements for admission are satisfied, citing 442 U.S. at 606. Again, as Judge Sloviter noted, the parents did not have the final decision making authority when the child's liberty interest was at stake.

Also, as Judge Sloviter pointed out, the court was concerned with the child's separate constitutional rights, and the court could not necessarily rely upon the parental authority to vindicate the child's independent interest. However, the parents should be given a full opportunity to show that interest in the decision was congruent with the child's best interest and right.

We believe that this analysis of *Halderman, supra*, reflects that even Judge Aldisert did not take the view that parents have an absolute veto power over the decision of a neutral fact-finder to release a mentally retarded child. It is true though, as pointed out by Judge Sloviter in his dissent, that although both Judge Aldisert and Judge Rosenn disclaim the right of the parents to an absolute veto, they in effect held that one existed.

This Court's analysis of *Parham, supra*, and *Halderman, supra*, results in our holding that the defendants cannot allow parents to veto a decision made by a neutral committee or decision-maker as to the release of their child, although the committee certainly must give much weight to the opinions of the parents and to their part in the process of determining whether the child should be transferred.

A partial summary judgment in accordance with these findings of fact, conclusions of law has been entered this day.

Dated 3/28/84

(s) Charles M. Allen
Charles M. Allen, Chief Judge

cc: Counsel of Record

Supreme Court, U.S.
FILED
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No. 92-351

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

LEONARD E. HELLER, Secretary,
KENTUCKY CABINET FOR HUMAN
RESOURCES - - - - - - - - Petitioner

versus

SAMUEL DOE, by His Mother and
Next Friend, MARY DOE, Et Al. - Respondents

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. May Kentucky, consistent with the equal protection clause of the fourteenth amendment, involuntarily commit mentally retarded adults to state treatment facilities under a clear and convincing standard of proof, while requiring proof beyond a reasonable doubt for involuntary commitment of similarly situated mentally ill adults?

2. May Kentucky, consistent with the equal protection clause of the fourteenth amendment, permit third persons to participate as if they were parties in the involuntary commitment of mentally retarded adults when they are not permitted to participate as if parties in the involuntary commitment of similarly situated mentally ill adults?

3. May Kentucky, consistent with due process of law, permit third persons to participate as if they were parties in the involuntary commitment of mentally retarded adults?

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No. 92-351

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

LEONARD E. HELLER, Secretary, KENTUCKY
CABINET FOR HUMAN Resources - - - *Petitioner*

v.

SAMUEL DOE, by His Mother and Next Friend,
MARY DOE, Et Al. - - - - - - - *Respondents*

RESPONDENT'S BRIEF IN OPPOSITION

The respondents, Samuel Doe and a class of mentally retarded adults in Kentucky, respectfully request that this Court deny the petition for a writ of certiorari for the reasons stated in this brief.[1]

COUNTERSTATEMENT OF THE CASE

Neither the factual situation which gave birth to this case nor its subsequent evolution is accurately reflected in the petitioner's statement of the case. Both are necessary to this Court's proper disposition of the petition for certiorari.

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[1] The petitioner, Leonard E. Heller, heads the Kentucky Cabinet for Human Resources (Cabinet) and is the Kentucky official responsible for the administration of the state's four intermediate care facilities for mentally retarded individuals (ICF/MR) (formerly called mental retardation residential treatment centers). The respondents include the individual named plaintiff, Samuel Doe, and a certified class of mentally retarded adults in Kentucky.

At the start of this lawsuit in 1982, Kentucky had a comprehensive statutory scheme which governed the civil commitment of both mentally ill and mentally retarded individuals to residential treatment centers. *Ky. Rev. Stat. Ann.* Chapters 202A and 202B (Baldwin 1982). This statutory scheme provided an array of procedural rights, including the right to counsel, the right to a judicial hearing, the right to the beyond a reasonable doubt standard of proof, and the right to annual judicial review of the commitment. These rights in their entirety were explicitly made applicable to mentally retarded persons by *Ky. Rev. Stat. Ann.* § 202B.050 (Baldwin 1982).

Rather than conform to these statutory provisions concerning the admission of mentally retarded adults, the Kentucky Cabinet for Human Resources [Cabinet] adopted a policy by which it characterized as "voluntary" virtually every commitment to a state mental retardation facility. By using this fiction, the Cabinet routinely circumvented the statutory commitment procedures and adopted an informal admissions process called the Record Review Committee [RRC].[2] The RRC did not use the statutory admissions standards, but instead employed unpublished criteria to determine the mentally retarded individual's suitability for admission to state mental retardation facilities. 22a-23a.[3]

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[2] It is for this reason that *Ky. Rev. Stat. Ann.* Chapter 202B was indeed, as the Cabinet notes, one of the "least used chapters." Petition for Writ of Certiorari [Petition] at 6.

Individuals also had substantive rights under Kentucky law, including the requirement that a civil commitment could not take place unless (1) the individual presented a danger to self or others, and (2) the hospitalization represented the least restrictive mode of treatment. Furthermore, if the criteria for commitment were no longer met, the individual was entitled to immediate release. *Ky. Rev. Stat. Ann.*, Chapters 202A and 202B (Baldwin, 1982). In circumventing class members' procedural rights, the Cabinet also denied them these substantive rights.

The individual named respondent, Samuel Doe, filed a lawsuit on behalf of himself and other similarly situated mentally retarded individuals in August 1982.[4] The class sought the benefit of the existing state statutory standards and procedures concerning their commitment to state facilities. In an opinion dated March 28, 1984, the District Court initially rejected respondents' challenge to the Cabinet's failure to follow Kentucky's statutory commitment procedures for the mentally retarded. 60a-72a.[5] On

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[3] References to the Appendix to the Petition for Certiorari are denoted by a page number followed by the letter "a." Citations to the record in the District Court are indicated as "R," followed by the docket number of the document and the name of the document.

[4] In 1971 Samuel Doe, born with a condition of mental retardation, was placed at the age of 18 in the custody of the state officials of the agency which is now known as the Kentucky Cabinet for Human Resources [Cabinet]. Under the authority of the Secretary of the Cabinet, he was placed at the Outwood State Hospital in Dawson Springs, Kentucky. R.76: Mary Doe Affidavit at 2-3; Appendix in Support of Motion for Summary Judgment at 37-38. On April 1, 1977, after six years of institutionalization, Doe was adjudicated as incompetent by Christian County Circuit Court on a petition by the state. *Id.* at 4. No other judicial proceedings occurred before or since with respect to the respondent's admission, continued confinement or release from Outwood. *Id.*

[5] The Cabinet had a policy of permitting parents to veto a decision by a state facility to seek community placement for their children in lieu of continued confinement. In this first opinion, the District Court held that this practice violated the adult children's due process rights under the fourteenth amendment. 72a. The Cabinet did not appeal.

January 9, 1986, the District Court reconsidered class members' challenge and ruled that the admission practices adopted by the Cabinet were a violation of equal protection. 54a-58a. The court ordered the Cabinet to begin using existing state statutory standards and procedures for the admissions of mentally retarded adults within 60 days of its order. 58a-59a.

The 1986 Kentucky General Assembly responded swiftly, striking from *Ky. Rev. Stat. Ann.* § 202B the section guaranteeing the mentally retarded a judicial determination prior to commitment, and defining as voluntary any commitment effected on the application of a retarded person's parents or guardian. 41a; R.120: Plaintiffs' Motion for Preliminary Injunction, Appendix at 1-6.

In response, the class sought a declaration that the 1986 legislative amendments were unconstitutional. The District Court granted relief on November 20, 1986, finding that Kentucky could not, consistent with due process and equal protection, deprive mentally retarded adults of a hearing concerning the propriety of their initial commitment to state facilities. 59a.[6] The Cabinet appealed the grant of a preliminary injunction to the Court of Appeals for the Sixth Circuit. On June 15, 1988, the Court of Appeals issued an opinion affirming in part and reversing in part. 19a-38a.

The Court of Appeals reversed that portion of the District Court's decision which held that due process required a judicial commitment hearing, but affirmed the District Court's ruling that the Record Review Committee system did not conform with due process. 28a-34a.

The Sixth Circuit next held that the recognized distinctions between the mentally ill and the mentally retarded were not rationally related to Kentucky's statutory exclusion of mentally retarded individuals from civil commitment procedures. 34a-35a.[7] On equal protection grounds, therefore, the Court of Appeals affirmed the District Court's holding and required judicial hearings for mentally retarded adults "either upon admission, or, if now committed, when they reach adulthood." 35a.

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[6] Petitioner asserts that the "District Court's preliminary injunction of November 20, 1986, had unanticipated results as evidenced by the case of Tracy Horton." Petition at 8. This mischaracterizes the Tracy Horton case, which was an anticipated, not an unanticipated, result of the District Court's order that the state grant a hearing to mentally retarded adults facing involuntary commitment. It was fully anticipated that juries would sometimes find that the state had not met its burden of justifying an involuntary commitment under *Ky. Rev. Stat. Ann.* Chapter 202B and, specifically, that a person could be provided for more appropriately in a setting less restrictive than a state institution.

(footnote continued)

(footnote continued)

Moreover, petitioner's reliance on the Thomas Horton deposition is improper. 8a-9a. *See* R.213. An agreed order entered by the District Court on November 20, 1990, limited to 30 days the time for the parties to file discovery pertinent to a motion for summary judgment then pending. R.211: Agreed Order. On January 10, 1991, 21 days past the deadline, the Cabinet deposed Thomas Horton. Counsel for the class members objected on the record to the use of the deposition for summary judgment purposes, R.213: Horton depo. at 4-6; it was not used; and class members, accordingly, had no occasion to register this objection with the District Court.

[7] "The Commonwealth identifies two interests which it argues are served by the distinction it draws between the mentally ill and the mentally retarded: (1) an interest in not imposing unnecessary procedural obstacles which might prohibit legal guardians from seeking available services for their mentally retarded wards; and (2) its interest in prioritizing diagnostic and service resources to the mentally retarded as soon as possible instead of expending resources in time-consuming procedures prior to admission. However, surely these interests apply to the mentally *ill* as well; the Commonwealth cannot show that the *distinction* which is drawn is rationally related to its stated purposes." 35a.

This Court denied the Cabinet's petition for writ of certiorari. 109 S. Ct. 495 (1988).

The cycle of events which again brings respondents to this Court began with the revision of *Ky. Rev. Stat. Ann.* § 202B enacted by the 1990 Kentucky General Assembly.[8] This revision came after the parties had submitted to the U. S. District Court on October 30, 1989, but before the court had acted on it, an agreed final compliance plan designed to implement the decisions of the Sixth Circuit and the District Court. R.189A: Agreed Final Compliance Plan.[9]

While the agreed final compliance plan would have required Kentucky to give to adult mentally retarded persons the same rights and procedures with respect to commitment as the state gives to the adult mentally ill, the 1990 amendments (House Bill 511) gutted those pro-

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[8] If the petitioner "has been required to actually litigate this matter over the course of ten years," Petition at 12, it is not due to any lack of guidance by this Court on the issues presented, as the petitioner claims; rather, it is due to the Kentucky General Assembly's twice attempting, in 1986 and 1990, to evade rulings by the United States District Court for the Western District of Kentucky and the Court of Appeals for the Sixth Circuit. Petitioner's speculations about the intent of the General Assembly in revising the civil commitment statute are totally without foundation in this court record. See Petition at 6 ¶ 2, 7 ¶¶ 1 and 2, and 9 ¶¶ 2 and 3.

[9] No number has been assigned this document. Since it occurs on the district court docket continuation sheet between entries 189 and 190, respondents here designate it R.189A.

tections as far as the mentally retarded were concerned, lowering the standard of proof required to institutionalize them and giving family members and others extraordinary influence over the commitment process.[10] On May 18, 1990, respondents challenged as unconstitutional various sections of the new legislation. R.201: Plaintiffs' Motion for Preliminary Injunction and/or Summary Judgment. On July 1, 1991, the District Court addressed four issues raised by class members, holding (1) that procedures established by House Bill 511 for voluntary admissions and for legal representation are constitutional, 13a, 16a, but (2) that the failure to provide for release of voluntarily admitted adults at their own request is unconstitutional, 14a; (3) that the provision allowing mentally retarded persons to be committed under a clear and convincing standard of proof is unconstitutional under the equal protection clause, 15a-16a; and (4) that provisions allowing third parties to participate in commitment proceedings "as if" parties violated class members' due process and equal protection rights, 16a.

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[10] Petitioner distorts the factual situation with regard to the standard of proof prior to the 1990 amendments in stating that "There was no separate specified standard of evidence for involuntary proceedings for admission to one of CHR's mental retardation facilities." Petition at 6-7. Prior to the 1990 amendments, the incorporation by reference in *Ky. Rev. Stat. Ann.* 202B.050 to the rights of mentally ill persons gave the mentally retarded the right to a judicial hearing under the beyond a reasonable doubt standard. 4a, 11a, Petition at 6. The 1990 amendments eliminated the reference and lowered the standard for the mentally retarded. 11a, 14a.

The third parties whom House Bill 511 would permit to play a role in the commitment proceedings were variously described in the statute as "guardians and immediate family members" (permitted to act as parties and to appeal "any adverse decision"), "parent or guardian" (permitted to hire expert witnesses), and "guardian, limited guardian, or other authorized representative" (permitted to appeal a final judgment).

The Cabinet appealed to the Court of Appeals for the Sixth Circuit. On June 1, 1992, the Sixth Circuit held that "mentally ill and mentally retarded are identical insofar as they lose their personal liberty by involuntary institutionalization." 7a. Accordingly, the Sixth Circuit ruled that equal protection requires that, since Kentucky applies the reasonable doubt standard in committing the mentally ill, the state must apply the same standard in committing the mentally retarded. 4a-7a. The Sixth Circuit also affirmed the District Court's holding that Kentucky's practice of allowing third persons to participate as if parties in the involuntary commitment proceeding of mentally retarded adults violates equal protection and due process. 7a.[11]

SUMMARY OF THE ARGUMENT

The decision of the Court of Appeals for the Sixth Circuit in this case is grounded in principles of due process and equal protection well-settled by precedent of this Court. The Sixth Circuit is not in conflict with other courts of appeal on the issues decided in this case. Nor does the decision of the Sixth Circuit misapply this Court's opinion in *Kremens* v. *Bartley*, 431 U.S. 119 (1977).

Kentucky statutes require a reasonable doubt standard and do not permit the participation of non-parties in proceedings for civil commitment of the mentally ill. The Sixth Circuit found no differences of constitutional significance between the mentally ill and the mentally retarded or the purposes for their commitment that would justify affording the mentally retarded lesser protection in commitment proceedings. 5a. In its analysis, the Court of Appeals properly applied well-established equal protection principles. The Sixth Circuit likewise broke no new ground in finding that, because the decision to commit a mentally retarded adult is not within the discretion of a third party—even a parent—whose interests may be adverse to those of the retarded person, Kentucky's practice of allowing third persons to participate as if parties in involuntarily committing mentally retarded adults violates due process.

The Sixth Circuit did not fail to heed this Court's instruction, in *Kremens* v. *Bartley*, to attend to the differences between the mentally ill and the mentally retarded, but properly inquired as to whether any such differences were rationally related to the differences in commitment procedures that the Cabinet sought to defend. Since it applies well-settled principles of due process and equal protection, is consistent with *Kremens* v. *Bartley*, and is in no conflict with other courts of appeals, the decision in this case raises no issue requiring further clarification by this Court and does not warrant this Court's review.

REASONS FOR DENYING THE WRIT

I. The Court of Appeals Decision Is Grounded in Long-Established Supreme Court Precedent Enunciating the Principles of Equal Protection and Due Process

1. The Court of Appeals for the Sixth Circuit decision that, in Kentucky, equal protection requires (1) that the reasonable doubt standard of proof must apply in proceed-

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[11] As to the constitutionality of the statute's failure to provide for the release of a voluntarily admitted patient upon request, the Sixth Circuit found no actual case or controversy and reversed the District Court on this issue. 3a-4a.

ings involuntarily to commit mentally retarded adults, and (2) that third persons must not be permitted to participate as if parties in involuntary commitment proceedings is grounded in long-established Supreme Court precedent enunciating the principles of equal protection. 7a. See *Baxstrom* v. *Herold*, 383 U.S. 107 (1966); *Jackson* v. *Indiana*, 406 U.S. 715 (1972). In lowering to clear and convincing the standard of proof for civil commitment of the mentally retarded, and in allowing third persons to participate as if parties, the 1990 legislative amendments denied to the mentally retarded protections afforded by state statute to the mentally ill.[12] In *City of Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), this Court clearly summarized the equal protection principles applicable to the mentally retarded:

> To withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose . . . The state may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.

473 U.S. at 446. The Sixth Circuit in *Doe* v. *Austin* previously recognized that "as a matter of fact, there are differences between the mentally ill and the mentally retarded," 848 F.2d at 1394 [*see*, *Kremens* v. *Bartley*, 431 U.S. 119, 135-36 (1977)], but pointed out that "the mere identification of differences is not enough; equal protection 'require[s] that a distinction made have some relevance to the purpose for which the classification is made.'" *Id.*, citing *Baxstrom* v. *Herold*, 383 U.S. 107, 111 (1966). *See Jackson* v. *Indiana*, 406 U.S. 715, 724 (1975). 34a-35a.

The Sixth Circuit again affirmed these well-established equal protection principles in holding that the "mentally ill and mentally retarded are identical insofar as they lose their personal liberty by involuntary institutionalization." 7a. Accordingly, the Court of Appeals properly held that mentally retarded adults in Kentucky are entitled to the same standard of proof as the mentally ill and that the state may not impose on the mentally retarded a greater burden than is imposed on the similarly situated mentally ill by permitting third persons to act as if parties in the commitment process. 7a. The Cabinet's argument that the circuit courts need further guidance on the principles of equal protection is groundless. The Sixth Circuit's decision is firmly based on well-settled principles of law.

2. As a factual matter, the Court of Appeals for the Sixth Circuit properly found that the Cabinet's assertions that there are several relevant differences between mentally ill and mentally retarded persons which provide a basis for the different standards of proof are unsupported by any evidence in the record:

> There is no evidence whatsoever to show that mentally retarded persons are not "stigmatized," or that the treatment that they receive is less "intrusive" than the treatment administered to mentally ill persons. There is also dispute as to whether mentally retarded persons can be treated so as to improve their condition.

6a. Moreover, the Court of Appeals correctly held that "the issue raised in this case relates to the *liberty* of the mentally retarded persons who are threatened with involuntary commitment. Regardless of the asserted benefits of institutionalization, it nevertheless results in the loss of personal liberty." 6a. *See also Addington* v. *Texas,* 441 U.S. 418, 425-26 (1979); *Vitek* v. *Jones,* 445 U.S. 480, 491 (1980), quoting *Humphrey* v. *Cady,* 405 U.S. 504, 509 (1972).[13] The Sixth Circuit's holding that Kentucky must apply the reasonable doubt standard in involuntarily committing mentally retarded adults and that third persons may not participate in the proceeding as if parties flows from the application of established equal protection principles to the fact that Kentucky statute provides for a reasonable doubt standard, and does not provide for the participation of third persons, in involuntarily committing mentally ill adults. To the extent that it involves Kentucky law, the decision is

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[12] *See Ky. Rev. Stat. Ann.* § 202A.076(2), which provides that, in hearings on the involuntary commitment of the mentally ill, "the manner of proceeding and rules of evidence shall be the same as those in any criminal proceeding, including the burden of proof beyond a reasonable doubt." No Kentucky statute permits intrusion of third persons on the commitment of the mentally ill.

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[13] It does not avail the petitioner simply to recite alleged differences between the mentally ill and the mentally retarded. Petition at 12, 13-16. Not all differences are relevant to the issue of differences in commitment standards. In considering what protections the mentally ill and mentally retarded must be afforded when they face involuntary institutionalization, the relevant factor is, as the Sixth Circuit correctly noted, the deprivation of liberty involved — a factor which is common to both groups. Although the Cabinet cannot point to evidence in the record to support the differences alleged, it may be acknowledged that differences exist. 5a-6a. However, since involuntary institutionalization is a deprivation of liberty by definition, the mentally ill and mentally retarded face the same threat in that regard — that is, they are similarly situated — and so are entitled to the same protections. Even were they supported by evidence, the differences alleged by the Cabinet are simply irrelevant to the question of what protections are appropriate and are, accordingly, not rationally related to differences in commitment standards. By way of contrast, the Sixth Circuit has ruled, and the respondents have not challenged the ruling, that a rational basis does exist for treating the mentally retarded differently from the mentally ill with respect to frequency of periodic review. 37a.

without relevance to other states; to the extent that it embodies established equal protection principles, it requires no further clarification by this Court. For these reasons, it does not warrant this Court's consideration.

3. In affirming the District Court's holding that Kentucky's practice of allowing third persons to participate as if parties in involuntarily committing mentally retarded adults violates due process, the Court of Appeals properly applied clearly established principles of due process enunciated in *Doe* v. *Austin,* 848 F.2d 1386 (6th Cir.), *cert. denied,* 488 U.S. 967 (1988):

> In *Austin,* we held that the decision to commit a mentally retarded adult is not within the discretion of his or her parents or guardians. Austin, 848 F.2d at 1386. Moreover, as recognized by the district court, these parties' interests may be adverse to the person facing commitment.

7a. *See also* 16a. Again, this holding by the Sixth Circuit presents no issue worthy of review by this Court.

II. The Court of Appeals Decision Is Not in Conflict With Any Other Court of Appeals Nor Does It Misapply This Court's Opinion in *Kremens* v. *Bartley*

1. The Court of Appeals relied on well-settled case law in holding that, in Kentucky, equal protection requires that the reasonable doubt standard of proof must apply in proceedings involuntarily to commit mentally retarded adults. 4a-7a. See *Baxstrom* v. *Herold,* 383 U.S. 107 (1966); *Jackson* v. *Indiana,* 406 U.S. 715 (1972); *Kremens* v. *Bartley,* 431 U.S. 119 (1977); *City of Cleburne* v. *Cleburne Living Center, Inc.,* 473 U.S. 432 (1985). The Court of Appeals similarly relied on clearly established case law in finding that, in

Kentucky, allowing third persons to participate in the commitment proceeding for the mentally retarded violated equal protection and due process of the law. 7a.

In neither ruling is the Sixth Circuit in conflict with other circuits; in neither ruling does the Court of Appeals depart from long-established Supreme Court precedent.

2. The petitioner suggests that the Court of Appeals misapplied this Court's instructions to the lower federal courts set forth in *Kremens* v. *Bartley*, 431 U.S. 119 (1977), noting that this Court "cautioned a District Court to pay 'careful attention' to the difference between the mentally ill and the mentally retarded." Petition at 13.

The Sixth Circuit previously acknowledged that "as a matter of fact there are differences between the mentally ill and the mentally retarded." *Doe* v. *Austin*, 848 F.2d 1386, 1394 (6th Cir.), *cert. denied*, 488 U.S. 967 (1988). That fact is not in dispute. However, the petitioner continues to ignore the red flag of caution that the Sixth Circuit raised:

> The *mere identification of differences is not enough;* equal protection require[s] that a distinction made have some relevance to the purpose for which classification is made. Citing *Baxstrom* v. *Herold*, 383 U.S. 107, 111 (1966).

5a, 35a. (Emphasis added.) Petitioner asserts that "sufficient differences have been established between the mentally ill and the mentally retarded to permit the Kentucky General Assembly to draft the differing procedures for their admission to state-operated facilities . . ." Petition at 15-16. As the Sixth Circuit recognized, however, it is not enough, under the principles enunciated by this Court in *Baxstrom* v. *Herold*, to recite the differences. It is essential that such differences as exist are rationally related to the differences in commitment procedures that the Cabinet seeks to defend. That is the threshold at which the petitioner balks. The Court of Appeals did not misapply *Kremens*. While it attended to the question of differences, in accordance with *Kremens*, the court found that those asserted by the petitioner were unsupported by any evidence in the record and that, in any event, none of the asserted differences justified institutionalizing the mentally retarded under more liberal standards than those applied to the mentally ill. The respondents submit that the petitioner raises no real issue of conflict among courts that deserves review by this Court.

CONCLUSION

The petition does not present any question which warrants review by this Court. The Court of Appeals for the Sixth Circuit properly found that equal protection requires the application of the same reasonable doubt standard of proof for the mentally retarded as is afforded the mentally ill and that equal protection and due process prohibit the intrusion of third persons as if parties in the commitment process of the mentally retarded, as of the mentally ill. This holding presents no conflict with the decisions of this Court or the Circuit Courts of Appeals. The Sixth Circuit ruling is expressly predicated on Kentucky statutes and will affect none other than the litigants. The petition for writ of certiorari should thus be denied.

Respectfully submitted,

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Dated: September 24, 1992

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FILED
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OFFICE OF THE CL

No. 92-351

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

LEONARD E. HELLER, Secretary,
KENTUCKY CABINET FOR HUMAN
RESOURCES - - - - - - - - Petitioner

versus

SAMUEL DOE, by His Mother and
Next Friend, MARY DOE, Et Al. - Respondents

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

JOINT APPENDIX

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October 25, 1982 — NR. 3 — Plaintiff Doe's original complaint filed in U. S. District Court, Western District of Kentucky, Paducah Division.

May 4, 1983 — NR. 60 — Class Action Order certifying as a class action and designating class as all mentally retarded persons in Commonwealth of Kentucky who are presently committed or who may in the future be subjected to being committed to a state hospital, institution or other mental retardation residential treatment center involuntarily on the basis of their condition or mental retardation and who contend that said involuntary commitment violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the Constitution, 29 USC Sec. 794, KRS Chapters 202A, 202B, 210, and 31.

March 28, 1984 — NR. 106 — Findings of Fact, Conclusions of Law and Memorandum Opinion on motion of plaintiff for partial summary judgment.

March 28, 1984 — NR. 107 — Partial Summary Judgment that motion for partial summary judgment be denied insofar as it pertains to plaintiff's claims that mentally retarded persons should not be placed in Mental Retardation Residential Treatment Centers without a court determination of dangerousness and mental retardation; motion for partial summary judgment insofar as it pertains to policy of defendants in allowing parents an absolute veto power over the decision of the Release Committee to place a mentally retarded person in the community is sustained. Not final and appealable.

January 9, 1986 — NR. 117 — Memorandum Opinion of U. S. District Court, Western District of Kentucky, Louisville Division.

January 9, 1986 — NR. 118 — Partial Summary Judgment as to persons over 18 and who are profoundly or severely retarded, defendants may not admit to mental retardation residence treatment centers unless procedures in KRS 202A.071 and 202A.076 followed. Further, this judgment shall not take effect for 60 days, and parties shall meet together for purpose of working out solution to problems created by partial judgment. Further, any part of Court's March 28, 1984 opinion and order in conflict with Court's memorandum opinion of this date and partial judgment of this date, set aside.

November 20, 1986 — NR. 126 — Memorandum Opinion on motion of plaintiff for preliminary injunction and summary judgment and on motion of defendant for reconsideration of opinion and partial summary judgment of January 9, 1986.

November 20, 1986 — NR. 127 — Preliminary injunction and partial summary judgment as follows: 1. Defendants enjoin from committing to mentally retarded treatment center, or any other facility for treatment of mentally retarded, any allegedly mentally retarded person over 18 years of age without first granting him or her judicial hearing to determine whether or not he or she should be committed under standards set out in KRS 202B.040(1-4). Defendants likewise enjoined from continuing to confine any allegedly mentally retarded person in any such institution after he or she has reached 18th birthday, unless judicial hearing and determination made that said standards set out have been met. Such hearing shall take place not later than 3 months after person already committed has reached age of 18. Confined mentally retarded person referred to in preceding 2 sentences may continue to be confined between time such person attains age of 18, and time he or she receives required judicial hearing. Plaintiffs shall give security in amount of $ 100. 2. Plaintiffs further granted partial summary judgment on issue of unconstitutionality of KRS Chapter 202B as amended, such statute being in violation of due process and equal protection rights of plaintiff. 3. Parties shall have 60 days from date of this order to meet and confer for purpose of submitting to Court agreed compliance plan for provisions of judicial proceedings in accord with opinion entered this day.

June 15, 1988 — Opinion of the Court of Appeals for the Sixth Circuit.

July 1, 1991 — Memorandum Opinion of the U. S. District Court for the Western District of Kentucky.

July 1, 1991 — Partial Summary Judgment and Preliminary Injunction of the U. S. District Court for the Western District of Kentucky.

June 1, 1992 — Opinion of the Court of Appeals for the Sixth Circuit.

Civil Action No. C 82-0197-P(J)

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

SAMUEL DOE, by his Mother and next friend,
Mary Doe, on behalf of himself and all
others similarly situated, - - - - - *Plaintiff*

v.

BUDDY ADAMS, Secretary, Kentucky Cabinet
for Human Resources; and
JACK FARLEY, Public Advocate, Kentucky
Department of Public Advocacy, individually
and in their official capacities, - - - *Defendants*

COMPLAINT

I.

PRELIMINARY STATEMENT

1. This is a class action for declaratory and injunctive relief to require defendants to make available to the involuntarily committed mentally retarded the same procedural safeguards and guarantees which they make available to the involuntarily committed mentally ill, including but not limited to the right to trial by jury, the right to counsel, and the right to periodic judicial review at least every 360 days of the order authorizing involuntary commitment. Defendants' refusal to assure that the plaintiff and the class he represents are provided these and other procedural safeguards, guaranteed to the involuntarily committed

mentally retarded under the provisions of KRS 202B and KRS 202A, violates their rights secured by the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and Section 504 of the Rehabilitation Act, 29 U.S.C. §794.

II.

JURISDICTION

2. Jurisdiction in conferred on this Court by 28 U.S.C. §1343(3) and (4), which provides this Court original jurisdiction in all civil actions authorized by 42 U.S.C. §1983 to redress the deprivation, under color of state law, of any right, privilege or immunity secured by the Constitution and laws of the United States, and 28 U.S.C. §1331, which provides this Court original jurisdiction in all civil actions arising under the Constitution and laws of the United States. The declaratory and injunctive relief sought is authorized by 28 U.S.C. §§2201 and 2202, Rule 57 of the Federal Rules of Civil Procedure, and 42 U.S.C. §1983. Jurisdiction of the state law claims is conferred under the doctrine of pendent jurisdiction.

III.

PARTIES

3. Plaintiff Samuel Doe is an indigent severely mentally retarded person who is involuntarily committed to Outwood State Hospital [Outwood], a State institution for the care and treatment of the mentally retarded located in Christian County, Kentucky. Plaintiff has been institutionalized at Outwood for over ten (10) years. This action is brought on his behalf by his mother and next friend, Mary Doe.

4. Defendant Buddy Adams is Secretary of the Cabinet for Human Resources. In that capacity, he has the authority and responsibility under KRS 210.045 for the administration of all State institutions and facilities for the mentally retarded, including but not limited to responsibility to assure that mentally retarded persons involuntarily committed to any State institution or other facility are afforded all the rights guaranteed under KRS 202A and KRS 202B.

5. Defendant Jack Farley is the Public Advocate for the Commonwealth of Kentucky authorized under the provisions of KRS 31. In that capacity, he has the authority and responsibility for administration of the Kentucky Department of Public Advocacy which maintains and operates a state-wide program for the individual representation by counsel of indigent persons who are at risk of or are being subjected to incarceration or confinement based upon a condition of mental disability.

6. The defendants are sued individually and in their official capacities. In all activities and at all times relevant to this Complaint, the defendants acted under color of State law.

IV.

CLASS ALLEGATIONS

7. Plaintiff Samuel Doe brings this action on behalf of himself and all others similarly situated pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure. Plaintiff seeks to represent the class of all mentally retarded persons in the Commonwealth of Kentucky who are at risk of or are being subjected to involuntary commitment to a State hospital, institution or other mental retardation residential treatment center on the basis of their condition of mental retardation.

8. The class defined in ¶7, *supra*, comprises in excess of 1100 mentally retarded persons statewide who are at this time involuntarily committed to various State facilities. In addition, there is an indeterminate number of mentally retarded persons who are at risk of being involuntarily committed to those same State facilities. As such, the members of the class are so numerous that joinder of all members is impracticable.

9. Virtually all members of the class are indigent.

10. All members of the class are directly affected by the practices and policies of the defendants which preclude or otherwise result in a refusal to make available the precommitment and post-commitment procedural safeguards guaranteed under KRS 202A and KRS 202B. As such, all members of the class share in common the same questions of law and fact with respect to the actions of defendants.

11. The claims of plaintiff, as representative party, are typical of the claims of the class. Plaintiff will fairly and adequately protect the interests of the class. Plaintiff has no interest which is now or may be potentially antagonistic to the interests of the class. Plaintiff is represented by the Legal Aid Society, Inc. and Western Kentucky Legal Services, Inc., whose counsel are experienced in class action civil rights litigation, including the rights of the institutionalized mentally retarded.

12. The parties opposing the class have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

V.

FACTUAL ALLEGATIONS

13. Over ten years ago, plaintiff was committed at the initiative of his mother to the custody and care of State officials of an agency now known as the Kentucky Cabinet for Human Resources. Plaintiff was committed at that time to Outwood due to his condition of mental retardation. Plaintiff has remained institutionalized at Outwood since that time.

14. In 1977, the Facility Administrator of Outwood petitioned under the provisions of KRS 203 to have plaintiff declared incompetent to manage his estate and affairs.

Shortly thereafter, Christian County Circuit Court entered an order declaring plaintiff to be incompetent for the purposes of KRS 203. Later in 1977, a Circuit Court order authorized the mother of plaintiff to act as Committee (i.e., legal guardian) for him, for the purposes of KRS 387.

15. Other than the events described in ¶14, *supra*, pertaining to the incompetency proceedings and appointment of committee for plaintiff pursuant to KRS 203 and KRS 387, no other state judicial proceedings have been initiated or have taken place at any time pertaining to plaintiff with regard to his admission to, continued confinement at, or discharge from Outwood.

16. At no time during his confinement at Outwood have defendants made available or has plaintiff otherwise obtained judicial review, the assistance of counsel, to the benefit of trial by jury or other procedural safeguards and guarantees with regard to his commitment to Outwood, per the requirements of KRS 202A and KRS 202B.

17. At all times during his confinement to Outwood, plaintiff has remained subject to indeterminate commitment without authority of court order pursuant to KRS 202A, KRS 202B or any other provision of state law authorizing the commitment of plaintiff to the custody and care of defendants.

18. Plaintiff is a member of the plaintiff class, per the Opinion and final Judgment entered by Chief Judge Allen in *Kentucky Association for Retarded Citizens* v. *Conn*, 510 F.Supp. 1233 (W.D. Ky. 1930). aff'd, 674 F.2d 582 (6th Cir. 1982). As such, plaintiff has been determined to be involuntarily committed for the purposes of KRS 202B, and defendants are precluded under principles of *res judicata* and estoppel from asserting that plaintiff is not involuntarily committed or that he is not entitled to the rights guaranteed to him under KRS 202A and KRS 202B.

19. The various State facilities to which the defendant Secretary authorizes the commitment of the plaintiff and plaintiff class members, including but not limited to Outwood, are programs or activities which receive federal financial assistance. The various State facilities to which the defendant Secretary authorizes the commitment of mentally ill persons are programs or activities which receive federal financial assistance.

STATUTES AND REGULATIONS PERTAINING TO THE INVOLUNTARY COMMITMENT OF THE MENTALLY RETARDED

20. KRS 202B is a statutory Bill of Rights for the mentally retarded. KRS 202B embodies, *inter alia*, procedural safeguards and guarantees pertaining to the involuntary commitment of mentally retarded persons. No such involuntary commitment may take place without the consent of the defendant Secretary of the Cabinet for Human Resources.

21. The involuntary commitment of a person on the basis of mental retardation may not occur without a determination, *inter alia*, that the person is mentally retarded, that he is a danger to himself or others, and that the least restrictive mode of treatment for that person requires placement in a hospital, institution or other mental retardation residential treatment center, per KRS 202B.040.

22. KRS 202B explicitly incorporates all procedural safeguards and guarantees embodied in its companion statute, KRS 202A. Specifically, KRS 202B.050 provides: "All rights guaranteed by KRS Chapter [ ] 202A . . . to mentally ill persons shall apply to mentally retarded persons."

23. The rights guaranteed to both the mentally ill and the mentally retarded under the provisions of KRS 202A and KRS 202B include specific precommitment and postcommitment procedural safeguards and guarantees, including but not limited to the right to notice and hearing, the right to trial by jury, the right to counsel, and the right to judicial review of the order authorizing the involuntary commitment of the person on the basis of mental disability at least every 360 days.

24. KRS 202B.060 requires the defendant Secretary to adopt rules and regulations for the specific purpose of the proper administration and enforcement of KRS 202B. The defendant Secretary has promulgated regulations pursuant to KRS 202B.060 which became effective over five years ago, on June 1, 1977. See 902 KAR 12:010-050, entitled "Hospitalization of Mentally Ill and Mentally Retarded."

25. Under the heading entitled "Due Process for Patients", 902 KAR 12:010 recognizes and provides that the defendant Secretary has the duty to promulgate rules and regulations:

> which protect, defend, and uphold the statutorily numerated rights of all persons who face the possibility of residing in a state mental institution. Consistent with this authority and requirement, this regulation establishes certain minimum standards which must be met in order to assure due process of law for the residents of state mental institutions and for individuals named in any petition or civil proceeding which could result in their admittance to a mental institution.

These same regulatory provisions provide procedural safeguards and guarantees, including but not limited to the right to notice and hearing, the right to jury trial, and the right not to be involuntarily committed for a period of more than 72 hours unless formal court proceedings are initiated for the purpose of authorizing involuntary commitment for any longer period of time.

26. These same regulations further required the defendant Secretary, within 360 days of the effective date of the

regulations in June 1977, to take positive steps either to release any persons subject to "indeterminate commitment" to a less restrictive mode of treatment, or to initiate formal commitment proceedings provided for under KRS 202A in order to authorize continuing involuntary commitment of such persons to the institution for a specified period of time.

27. Defendants make available to the involuntarily committed mentally ill the procedural safeguards and guarantees required under KRS 202A, including but not limited to the right to notice and hearing, the right to trial by jury, the right to counsel, and the right to periodic judicial review at least every 360 days of the order authorizing their involuntary commitment.

28. Defendants have not and do not make available to the plaintiff and plaintiff class members the same procedural safeguards and guarantees they make available to the mentally ill who are at risk of or are being subjected to involuntary commitment.

29. The defendant Secretary and his agents have refused to comply with the procedural requirements of KRS 202A, KRS 202B and 902 KAR 12:010, including but not limited to the duty either to release plaintiff and plaintiff class members from indeterminate commitment to a less restrictive mode of treatment, or to take steps to initiate the formal commitment proceedings contained in KRS 202A which would result in a court order authorizing continued involuntary commitment for a definite period of time, not to exceed 360 days.

30. The defendant Public Advocate has the responsibility under KRS 31 to provide independent counsel to represent all indigent persons who are at risk of or are being subjected ~~to~~ involuntary commitment on the basis of a condition of mental disability, for the purposes of KRS 202A and KRS 202B.

31. The defendant Public Advocate has provided and continues to provide independent counsel to indigent persons who are at risk of or are being subjected to involuntary commitment for the purposes of KRS 202A and KRS 202B on the basis of a condition of mental illness.

32. The defendant Public Advocate has not and does not provide independent counsel to indigent persons who are at risk of or are being subjected to involuntary commitment for the purposes of KRS 202A and KRS 202B on the basis of a condition of mental retardation.

33. The defendants have been on notice for more than five years, since KRS 202A, 202B and 902 KAR 12:010 became effective in 1977, that plaintiff class members are entitled to the procedural rights provided under KRS 202A and 202B, including but not limited to the rights to notice and hearing, jury trial, representation by counsel, and periodic judicial review of their involuntary commitment.

VI.

CAUSES OF ACTION

34. Defendants, by virtue of their past and present practices, policies and omissions, which have resulted in plaintiff and plaintiff class members not obtaining the benefit of the procedural safeguards and guarantees provided for under KRS 202A and KRS 202B, violate the rights of the plaintiff and plaintiff class members secured by:

(a) The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, which guarantees the right to equal treatment under the law, including the right of the mentally retarded to be afforded the same precommitment and postcommitment procedural safeguards and guarantees which are afforded to the mentally ill;

(b) The Due Process Clause of the Fourteenth Amendment to the United States Constitution, which guarantees the right not to be deprived of a protected liberty interest, including but not limited to the state-created entitlement to procedural safeguards and guarantees prior and subsequent to involuntary commitment, as a result of arbitrary, unauthorized and unlawful state action;

(c) 29 U.S.C. §794, which guarantees the right of the mentally retarded not to be discriminated against on the basis of their handicapping condition under any program or activity receiving federal financial assistance;

(d) KRS 202A, KRS 202B and KRS 210, which guarantee the State statutory right of the mentally retarded who are at risk of or are being subjected to involuntary commitment to a State facility to obtain the benefits of the procedural safeguards and guarantees set forth therein; and

(e) KRS 31, which guarantees the State statutory right of an indigent mentally retarded person to obtain representation by counsel whenever he is at risk of or is being subjected to incarceration or confinement on the basis of a condition of mental disability.

VII.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays this Court:

(a) Assume jurisdiction of this action;

(b) Determine as soon as is practicable, pursuant to Rule 23 of the Federal Rules of Civil Procedure, that this action is maintainable as a class action for declaratory and injunctive relief;

(c) Declare that the rights of the plaintiff and plaintiff class members are violated by the refusal of the defendants to make available precommitment and postcommitment procedural safeguards and guarantees, including but not limited to the right to notice and hearing, the right to jury trial, the right to counsel, and the right to periodic judicial review of the order authorizing involuntary commitment;

(d) Enjoin defendants from depriving the plaintiff and plaintiff class members of the precommitment and postcommitment procedural safeguards and guarantees to which they are entitled;

(e) Order defendants to identify all class members who are involuntarily committed to the custody of the Secretary and to take steps to assure, within a reasonable period of time to be set by the Court, that the involuntary commitment of the plaintiff and plaintiff class members is judicially reviewed and authorized, or that they are otherwise released to a less restrictive mode of treatment, as provided for under the procedures and standards set forth in KRS 202A and 202B;

(f) Order defendant to submit to the Court periodic written reports documenting their compliance with the relief granted by the Court, until such time as defendants achieve full compliance;

(g) Grant plaintiff his costs and reasonable attorneys' fees; and

(h) Grant any and all other relief to which the plaintiff and plaintiff class members may be entitled.

Respectfully submitted,

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Dated: October 25, 1982

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DEPOSITION OF EDWARD SKARNULIS

Direct Examination by Mr. Lawlor:

• • • • • • •

Q.72 Can you define developmentally disabled for me.

A. There are two definitions of that term. The one that was most commonly used in the original definition of the phrase developmental disabilities was to encompass four major disability groups, mental retardation, cerebral palsy, epilepsy and autism, and that was the definition used by the federal government in the establishment of the Developmental Disabilities Act which I think was like 1973-74. But the most recent definition by the federal government has expanded that definition considerably and includes not only those four disability groups, but virtually anybody whose disability occurs during the developmental period of life.

Q.73 So would it be correct to say that mental retardation is included within the definition of developmentally disabled?

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A. Yes, and that is the largest sub-group within that definition.

Q. 74 Are you familiar with the state institutions for the mentally retarded in Kentucky?

A. Somewhat.

Q.75 Can you identify them?

A. Oakwood facility at Somerset, Outwood in Dawson Springs. Although the facility is owned by the state, it is operated by a private agency. Hazelwood facility in Louisville and Central State which is located in Louisville.

Q.76 Are you familiar with a hospital or institution in Glasgow?

A. Yes. I am aware of that facility. My understanding is that that serves primarily people with emotional problems. We also have people with mental retardation who are being served in the Eastern State facility, Childrens Treatment Center and Western. And once again, that is not my area of expertise but I understand that their primary disability was identified as mental illness and secondarily, there are people with mental retardation.

Q.77 Are you familiar with the terms mildly retarded, moderately retarded, severely retarded and profoundly retarded?

A. Yes, I am.

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Q.78 Can you explain what those terms mean.

A. Those are levels of mental retardation as defined in most standardized intelligence tests and the exact IQ scores that correlate to those levels differs somewhat depending on which standardized IQ tests you are talking about. But generally speaking, I think they go pretty much 50-75 IQ level is normally considered as mild level of disability, although that has now I understand dropped down to 70 IQ as the maximum. It used to be 50-75. 25-50, people with moderate level of retardation. 15-25, people with severe level and 1-14 are those with profound level of disability.

Q.79 Does it happen that an individual, a mentally retarded person may find himself in one category at one time and a different category at another time?

A. Yes, it is not a static concept.

Q.80 Okay, and what do you mean, it is not a static concept?

A. I mean IQ's change.

Q.81 Does adaptive behavior change?

A. Yes.

Q.82 Can you explain in a little more detail what you mean by not a static condition.

A. The definition of mental retardation once again used by the AAMD, American Association of Mental Deficiency and Rick Hooper implies that there can be many causes

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for a person to score at a certain level on an IQ test. On a standardized adaptive behavior scale, those can be related to emotional disturbance. Those can be related to environmental factors, such as the conditions under which the testing was done. They can be related to the type of test used. There can be physical impairments, sensory or motor deficits that could cause a person to score at one level one time and a different level another time. And lastly, the technologies that are being developed in the field have enabled us to affect dramatic gains in a person's level of development that weren't even considered possible one or two decades ago.

Q.83 Can you name me some examples of those.

A. The use of behavior modification, for example, has enabled us to help people who were devoid of self-help skills, in years past developed most if not all of their self-help skill ability, and that translates on those standardized tests as a significant improvement on their scores. We have adaptive equipment that is being developed using space age technology that enables people whose hearing, visual and other kinds of deficits interfered with their functioning level on IQ tests to demonstrate remarkable gains in their ability to interact with their environment. Those are some examples.

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Q.84 Are mentally retarded persons capable of improvement or change?

A. Yes.

Q.85 Is that true of all mentally retarded persons?

A. Yes.

* * * * * * * * *

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* * * * * * * *

Q.95 Are the institutions in Kentucky that you are familiar with for the mentally retarded viewed as a restrictive environment by you?

A. Can I ask my attorneys their advice on whether or not I need to answer that?

Q.96 Do you know the answer to the question?

A. Do I have an answer to the question?

Q.97 Yes.

A. Well, it depends in what capacity I am going to answer the question-whether I am answering as a state official or as a professional or personal.

Q.98 Well, for purposes of a deposition, you don't get a choice.

A. I'd still like to ask them if I have to answer that.

Mr. Kasdan: Go ahead and answer and if we need to follow up on it, we'll do it during cross examination.

A. Yes, I consider that a restrictive environment.

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Q.99 How is a state institution a restrictive environment?

A. Well, (1) it is located distant, in most cases, distant from the person's natural home community or family, the natural family. (2) it is a setting in which a large number of people perceived by society to be deviant are congregated together and increases the likelihood that the people living there will imitate the inappropriate behaviors of the other people there. (3) the fact that it is a congregate setting, as is true with most congregate settings, results in depersonalization and deindividualization. In other words, the individual needs have to be subsumed to the needs of the group and that of necessity, whether it is an Army boot camp or an institution for anybody or a dormitory in a college requires that the individual rights and needs are sometimes set aside in favor of what is expedient or necessary for the institution as a whole. I consider those restrictions.

Q.100 Is it restricted in terms of physical ability to move around?

A. Yes.

Q.101 How is it—would you view it as more restrictive than a community placement in the New Neighbors Program?

A. Yes.

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Q.102 Can you explain the difference?

A. Well, using the same parameters, people who are in the New Neighbors Program by and large, we have returned to their home community, where that was possible and where that was appropriate. So they are in their natural home community. Number two, people in the New Neighbors Program are surrounded by normal models rather than other people with mental retardation. Number three, since they live in normal ordinary housing, their individual needs can be attended to and programs can be more personalized. Lastly, within the limits of their disability, they are given free access to the entire array of generic community resources.

Q.103 Can you give me some specific examples of community living arrangements which you would consider less restrictive than the state institutions in Kentucky? What I am suggesting are different modalities, perhaps I don't know if I am using the right words.

A. What I can do is to describe some of the New Neighbors living arrangements.

Q.104 That would be fine.

A. Near Flemingsburg, we have a house which has been leased by the agency providing the services, a farmhouse which is located just on the outskirts of town serving three young adults with severe

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behavior problems and they have a number of fulltime staff who have been trained in behavior modification to work with those three young adults in modifying some of the very, very self-destructive behaviors that those young adults are engaging in. While it has the disadvantage of not being located in the community itself, the people that they relate to on a daily basis are people, so-called normal individuals. They are living in ordinary housing. They are close to their natural families. Those are young people with severe and profound levels of mental retardations.

We have some children in Louisville who have been placed in existing housing and families have been hired and paid to serve those children. Many of the children are children with severe and profound levels of disability with medically, related medical problems. The families are given support in the form of Respite and professional services to serve those children.

In Owensboro, we have some young adults, two men with moderate level of disability who are living with a staff member who is about their same age and the three of them live together in an apartment and the two young men go to a vocational center during the day. All of the people in the program have a day

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program of some sort.

Q.105 By day program, are you—

A. Either a vocational program for adults or a normal schooling for children.

Q.106 In the cases you've illustrated, does that mean they go to a program which is other than the location of the residence where they are sleeping at night?

A. Yes.

Q.107 Do you have any other examples you can offer?

A. We have a young adult living in Paducah who lives by himself in a house that he pays for, that he rents and about 100 yards away is another house that is owned by the people who are responsible for providing him with support services.

We have a young lady who is a middle-aged woman who is living with a retired couple. She was a hospital administrator for many years in Detroit, Michigan and the husband was working in juvenile corrections for many years. Despite the fact that they are nearly 70 years old, they are both very, very capable and competent people who are in effect serving as a friend to this young lady with mild level of mental retardation.

The system that we have set up as much as possible tried to key in on the individual needs of the person

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and develop an alternative that is most closely related to what they need.

Q.108 Is a person precluded from community placement because they are severely or profoundly retarded?

A. No.

Q.109 How is it that someone who is severely or profoundly retarded could be capable of living in the community living arrangement?

A. Reality is that most people live in the community; at the most no more than two to three percent of people with mental retardation have ever lived in an institutional setting at any one time. For every person in one of our institutions, there is 10 that is living in a community program with equally severe medical, behavioral or other kinds of problems. The real question, as I pointed out earlier, is not simply the level of ability of the person but the ability of the community to provide adequate resources or the family to provide adequate resources to sustain the person in the community.

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Q.113 Now would you be aware of whether or not a person is going to be placed out of an institution into a particular community living arrangement under the New Neighbors Program?

A. Yes.

Q.114 And how is it you would know that?

A. Normally the facilities either directly or through the Division for Institutional Care provide us with the names of the people that they feel are candidates for movement to the community. We serve as the liaison with the community programs.

Q.115 What information are you provided from the institution with regard to those clients?

A. Usually the information at that point, point of referral is minimal and we are talking mainly about name, age, sex, and community of origin.

Q.116 On the basis of that information, do you authorize the community placement?

A. What we do is to bring together the community-based program people with the institution people and the two of them meeting together, review the case and look at the ability of the community program to serve that person's needs.

Q.117 Does the community program—I take it you are alluding to the Comp Care Center, is that accurate?

A. Yes or their affiliate agencies if they aren't

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providing the services themselves.

Q.118 But for a general, for discussion purposes essentially, there is three entities involved—the institution, your agency, the Division, and the Comp Care Center or some counterpart to that.

A. Yes.

Q.119 Now from whom does the Comp Care Center obtain the information regarding the individual client? Is it from you or from the institution?

A. It has been—we have done things both ways where there was a question of confidentiality where the family was—we'll say the legal guardian. We have, after the family's approval of release of information, normally it has gone through us to the community programs.

Q.120 What happens if they don't give you a release of information?

A. If the family has not allowed or has objected to the placement of the person, we have not been allowed access to them for purposes of placement.

Q.121 Who has not been allowed access to them?

A. Our division or the community programs.

Q.122 Who does not allow you access to those clients?

A. My understanding is that the way in which the state laws are written, we are not allowed to do this.

Q.123 I'd like to know who—has it happened that you have

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requested information that you cannot obtain on particular clients?

A. In some cases, yes.

Q.124 Who tells you you cannot get that information?

A. The Division for Institutional Care or the facility. I want to clarify that. Our division as an agency of the state would have the same access to information as the Division for Institutional Care but the point is that our division would not be able to share that with the community programs.

Q.125 Have you ever requested—your agency, not the Comp Care Center—but has your division requested information regarding clients that has not been provided to you by the facility?

A. Not to my knowledge. Once again, we'd have no reason to ask for that information unless it was to be used by our agents, which are the Comp Care Centers.

Q.126 Have you ever requested information regarding a particular client in a state institution which the division has declined to share with you?

A. I have never asked for that information. In other words, I've never had that happen.

Q.127 Has it happened that there is a client on whom you have information that you have not been permitted to transfer that information to a Comp Care Center?

A. Yes.

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Q.128 Can you explain to me what the circumstances were.

A. Well, in the initial phases of the New Neighbors Program, we were planning to share information on all residents of our facilities who came from a given region that was paritcipating in the New Neighbors Program. We were planning to share that information with them. When it was called to our attention by the parents organizations, concerned parents organizations that—

Q.129 Would that be the concerned parents of Hazelwood?

A. Yes, actually, I believe it is called the Four C's which represents, claims to represent all the institutions. They called to our attention that they felt that would be a violation of confidentiality and not in keeping with the legislative intent for sharing that information and I understand, this is strictly word of mouth, but the implication was that they would sue if we attempted to share that information with the community.

Q.130 From whom did you draw that implication?

A. Mr. Draper, the Assistant Commissioner.

Q.131 Was it represented to you by Mr. Draper that he had spoken to representatives of the concerned parents group?

A. Yes.

Q.132 Would one of those people mentioned be Louise Underwood?

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A. I don't recall who it was he spoke with.

Q. 133 Are you familiar with Louisa Underwood?

A. I've met her.

Q.134 Mr. Skarnulius, what is the—is there a particular practice or procedure set up for the transmission of this kind of information generally? What is supposed to happen?

A. I don't have the procedure in front of me but the procedure as it is being operated now is that the people, the staff members in the facility identify those individuals they feel are the most likely candidates for placement into a community program.

Q.135 Is there any requirement about when that information is to be transmitted to you?

A. Yes.

Q.136 What is that requirement?

A. Well, one of the main requirements is that they first determine whether or not the family is in agreement with sharing that information with the division and with the community programs. Once that has been determined that the family is in agreement with the person being considered as a candidate for community programs, then our division is notified of that fact and our division in turn contacts the community program.

Q.137 Who are you notified by?

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A. The Division for Institutional Care.

Q.138 So does the information go from the institution to the Division for Institutional Care, who then transmits the information to you?

A. That is right.

Q.139 Has any other procedure been used in the past?

A. I understand that at least several years ago and I don't know, I wasn't in the state when this happened but that information was allowed to flow freely from institutions to community and back because the community programs were viewed as agents of the state for purposes of provision of services but that was stopped after the state was—well, I believe—I am not sure on this but I believe the community programs were found not to be agents of the state. We are not state agencies and also there was opposition from some of the institution parents.

Q.140 When was it that the practice was stopped that you know of?

A. Approximately two years ago.

Q.141 Sometime in 1980 or 1981?

A. 1980.

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Q.156 Were you told not to transfer that information to the Comp Care Center?

A. That is right.

Q.157 And who told you not to transfer the information?

A. Mr. Draper.

Q.158 Do you recall when that occurred?

A. October or November, 1980. I think it is the same incident that we were talking about before.

Q.159 Were you eventually permitted to transfer that information without the parent's permission?

A. No.

Q.160 Have you ever been permitted to do so?

A. No.

Q.161 Given that, is it your understanding that it is the existing policy not to transfer information on a particular client in those cases where the parent objects?

A. Yes.

Q.162 Has it occurred that, can you give me an idea of the approximate number of such cases that you are aware of?

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A. I can only say that we have moved some 140 plus people out since the project began with the exception of a few who are already in the community, a small number. Most of those were institutional residents and virtually all of them came out either with parental permission or with their not having any parents who were able to speak for them. And the Guardianship Office of the state represented them, gave permission for placement. In addition, there are some 36 who have been identified that we are planning to place between now and April 1st. So I know of 170 or 180 people who have been deemed to be candidates of the 850 plus who are residents of the institution at the beginning of this project. I don't know to what extent the Division for Institutional Care has looked at all of the other remaining people but I do know that many of them if not most of them, the parents have refused permission for placement.

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Q.191 Is it your understanding—do you have and understanding whether it makes any difference if the parent is not the legal guardian at the time they make the objection?

A. We have not differentiated.

Q.192 Has there been an occasion where the state is the legal guardian but a parent objects to the community

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placement?

A. Yes.

Q.193 And what happens in that situation?

A. At this time, we have been instructed not to place those people.

Q.194 Who has instructed you not to do so?

A. I am not sure what the source is but the instructions have come from the Assistant Commissioner.

Q.195 And who is that?

A. Mr. Draper.

Q.196 Is it your understanding that the parents have to agree before the client information is transferred from the particular institution to the division itself?

A. No.

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Q.200 And what do you mean by serious?

A. We know that the ability of the community programs to expand and take people into those programs has been much greater than our ability to refer candidates for placement. The community programs and both our Division and the Division for Institutional Care have been concerned about the difficulty of getting parental permission in a lot of cases.

Q.201 Has this resulted in delays in the placement of people?

A. Yes, it has.

Q.202 Have you received complaints from the community programs at the Comp Care Centers regarding this

problem?

A. Yes, we have.

Q.203 And to whom have those complaints been directed, do you know?

A. To the staff in my division, myself, Mr. Draper, the Secretary, the Commissioner.

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Q.235 Mr. Skarnulis, I would like to hand you a memorandum dated March 18, 1982, which I will mark as Exhibit 19. Have you had an opportunity to review Exhibit 19?

A. Yes, I have.

Q.236 Now in this memorandum, a number of problems are identified. Is it correct that you were involved in the preparation of these memorandums?

A. Yes, I was.

Q.237 The second paragraph of the memorandum refers to greater and greater difficulty in identifying and accomplishing placement of individuals residing in state facilities and that there are barriers to placements. Can you explain what is referred to in that paragraph.

A. The biggest barrier to placement is the one that has been alluded to before in this deposition and that is

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that numerous parents were asked for permission to allow their son or daughter to leave the facility and refused permission for their son or daughter to leave.

Q.238 I'll refer you to page two, top paragraph. That identifies nearly 70 percent of families who are mailed a request for release of information fail to reply. Do you have any better statistical information at this time regarding the failure of parents or families to respond regarding release of information?

A. Not statistical information, just the observation that it has continued to be a problem throughout the project.

Q.239 I'll refer you paragraph three on page two. It indicates that a second problem is the legal status of several residents is in limbo. Can you refer the problem that is referred to in that paragraph.

A. These were people with mental retardation, committed as children to the Bureau for Social Services which is now the Department for Social Services.

Q.240 What kind of problem is that creating?

A. The fact is that they are no longer children; they are now adults and that technically, under the law, when they reach their majority, they are not wards of the Department for Social Services but are adults

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in the legal sense in their own right unless a request for a competency hearing and adjudication of incompetency as an adult is what is determined. That was the problem that was referred to there.

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Q.270 Are the facilities themselves placing people in the community under the New Neighbors Program?

A. Not under the New Neighbors Program, no.

Q.271 Do you have any idea how many persons have been placed in the community by state institutions over the objections of the parents?

A. To the best of my knowledge, none have been. One case is currently pending but that is the only one I know of and I don't think that has been decided yet.

Q.272 Is it your understanding that in such a circumstance that the placement does not occur pending appeals under Senate Bill 285?

A. Yes.

Q.273 Does that Senate Bill 285 procedure referred to in that paragraph the same procedure as the discharge protocol under Exhibit 16?

A. It is contained in that discharge protocol document, yes.

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Q.310 Are there any other problems that you are alluding to that you needed help with from Ms. Fairchild in this memorandum?

A. There are no other problems other than those contained in the memorandum. The single biggest problem repeatedly has been the objections of the concerned parents organizations to this program.

Q.311 I would like to refer you to the first page of information pertaining to actual individual residents and I know the names are deleted. At the bottom of that page, it refers to a term called waiver. Would you please explain what that means.

A. Because of the fact that we wanted this community program to be well received and perhaps be a harping of things to come, we wanted to try to wherever possible have the community programs serve people that they were truly capable of serving where they had adequate resources, adequately trained staff to meet their needs. We didn't want anybody to get hurt or neglected when they came out into this program. So we did ask them to the extent that they could assess the needs of their people that were being

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referred to them and wherever they felt they could not serve somebody, to let us know. The Division then would personally send out staff members who would see those people and talk with both the institutional staff and the community staff and where we agreed that the community was legitimately objecting to serving those people, the division would grant a waiver. One of the reasons we implemented this plan was also because we didn't want regions simply serving people who were the easiest to serve and then not serving other people who had greater needs.

Q.312 What problem were you anticipating?

A. Well, there was some concern that some of the regions had been accustomed in the past to serving people with mild levels of disability with no medical or behavioral problems.

Q.313 Are such persons capable of community placement?

A. Well, all persons are capable of community placement given adequate resources.

Q.314 Go ahead. You were explaining the problem—

A. There was concern that some of the regions who would be given a grant of X number of dollars would simply select only those people who required few, if any, resources, and yet they would be getting a flat grant that would be as great as another region that was serving people who are relatively difficult to serve.

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Redirect Examination by Mr. Lawlor:

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Q.17 Mr. Skarnulis, you have described particular policy of not placing people in those cases where the parents object. I am talking about placement in the community. Do you agree with that policy?

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A. No.

Q.18 And why do you not agree with it?

A. I think the needs of the person with mental

retardation should predominate and not the needs of the parents.

Q.19 Based upon your extensive professional experience, has it occurred that parents may make the wrong decision?

A. I don't consider the needs or the rights of the parents as synonymous with the needs or rights of the people with mental retardation in all cases, no.

Q.20 And why is that?

A. Because I think that—and this is equally true with parents of people with normal intelligence that parents are not omnicient and they are fallible and sometimes their knowledge base, particularly if they have been separated from their son or daughter for many, many years, is based on a knowledge that they were given by professions in the field 10, 20, 30 years ago which is inconsonant with the knowledge base we have today.

Q.21 Is it your impression that the complaints or controversy promoted by some parents in the State of Kentucky stems form just a simple lack of knowledge?

A. I think in most cases, 90-95 percent of the cases, that is true. I think there are some people involved

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in that controversy who at this point are getting more secondary gain, ego enhancement, power, needs met than anything else. I don't think the needs of the people involved are primary to them.

Q.22 Can you explain various reasons that might cause a parent to make a wrong decision about the placement of their son or daughter.

Mr. Stratford: Don't you think we are going kind of far afield even if this is when you started? Now how is he going to know—

Mr. Lawlor: Stanley, he brought it up. Marty brought it up. I didn't bring it up.

Mr. Stratford: He didn't bring up this kind of speculation.

Mr. Lawlor: Marty Kasdan brought it up.

Mr. Stratford: Brought up what?

Mr. Lawlor: He brought up this whole thing about the controversy and whether parents should be able to do this or that.

Mr. Stratford: He brought up whether there was a controversy and he said yes, there was, but he didn't go

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into the speculation concerning the operation of the minds of these parents.

Mr. Lawlor: Okay, fine, your objection is noted.

Q.23 Based upon your professional experience, Mr. Skarnulis, can you explore with us some of the reasons why a parent might make an inappropriate decision regarding the placement of their son or daughter.

Mr. Kasdan: Dr. Skarnulis, we entered an objection. Go ahead and answer and the court will rule on that at a later date. It will either keep your answer in or strike it as it sees fit.

A. I have already alluded to some of those, I think, that in some cases, the level of knowledge of the professionals, social workers, psychologists, doctor, might be such that their advice to the parents, however well-intentioned, was not in keeping with the best of thinking in the field.

Q.24 Does it happen that parents are motivated to continue to keep their children in an institution, their son or daughter in an institution, out of concern about whether or not there will be a place for their son or daughter to live after they are gone?

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A. I think with many parents that is the concern, that the community programs are new and developing and

haven't been established long enough to satisfy them that they will be stable.

Q.25 Does it happen that parents lack certain information about the capabilities of their son or daughter?

A. Yes, I think some parents' assessments of their son's and daughter's potential is understated.

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DEPOSITION OF SUSAN TURNER

Direct Examination by Mr. McHugh:

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Q.78 And it is not a regular policy to ask them to come in, is that correct?

A. No, but they are certainly invited to come in on any case that it is legal for them to come in. We can't just ask them if the family doesn't want them. That has to—we have to have permission for release of information.

Q.79 Now just speaking as far as the committee, the Record Review Committee, okay, is there any committee role in release of individuals from the facilities?

A. No, except the only role is that we generally make a recommendation as to what we think would be appropriate for placement, the type of placement that the person would need. And we also make recommendations as to what we think the person needs such as self-help skills or whatever. So our recommendation would be this is what the person needs and when they get this, then the person is ready for placement out of the facility.

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Q.80 Okay, perhaps—let's go through the procedure. You said no, there was no committee role but then you went on to list a number of things.

A. The committee does not have ongoing roles in the facility.

Q.81 For example, somebody is going to be released. Is there a Record Review Committee meeting that is held?

A. No. There is a treatment planning or a discharge planning meeting at the facility and someone from here may very well sit in on it but it is not, it would not be in our role; as Record Review Committee Chairman would not be the reason I would sit in on the meeting.

Q.82 In terms of these admissions procedures that we have talked about, is there any difference in the way you treat a mentally retarded minor and mentally retarded adult?

A. Depending on how minor, I think. Yeah, if somebody is seven years old, there might be somewhat of a difference in that we would—even with a seven-year old, if they could sign in addition for themselves, we probably would. There would be very little difference unless the person was mildly retarded and competent in his own right. And then of course, an adult who would be competent in his own right would, for that instance, then be responsible for himself.

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Q.83 So really what you are saying, there is a difference between competent people and incompetent people and not between adults and children or adults and minors, is really what I want to ask.

A. I guess. We have very, very few people that would be in an MR facility who would be considered competent. They may have some degrees, under the new guardianship, you know, there is competency and competency and competency. So they may have certain varying degrees of competency. So I hate to use that term but I would say between the person who was competent in the very strictest sense and the individual who is incompetent. However, we do on anyone who is functioning well enough to really understand the process of being there, we do, whether they are 15 or whether they are 45, we do ask them about being there and request some type of indication that they understand and know this such as an X if they can't write. Most of them, many of them who would be functioning at that level would be able to sign their names. We have very few people who would be functioning that well though—very, very few.

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Q.226 As far as their being fewer mildly and moderately retarded persons at Outwood or at Oakwood or at Hazelwood, there are still mild and moderately

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retarded persons in those facilities today, isn't that correct?

A. At Outwood, I think we have moved—if there are any, there are very, very few because of court order to move anyone that is mild or moderately retarded out of Outwood. Oakwood still has a few but anyone who is mild or moderately retarded at Oakwood has a severe behavioral concomitant or physical disability concomitant that makes them unable to function.

Q.227 The same for Hazelwood?

A. Hazelwood has very, very few mild or moderately retarded. They have had a few and do have a few but again, it is a question of other physical handicaps.

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Cross-examination by Mr. Kasdan:

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Q.32 Would you briefly describe the degrees of mental retardation that you have been referring to?

A. Okay, there is mild, moderate, severe and profoundly retarded. There are numbered categories of IQ, but more, anybody's whose IQ is between say 50 and 75, 50 and 70, I can't remember exactly, 50 and 70, is considered to be mildly retarded. A person who is functioning between, and I really can't remember

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these numbers, between 35 and 50 is generally moderately retarded. I'm probably off two or three numbers on each one. So the numbers are really not that important. Generally, between 20 and 35 are severely retarded and below 20 are profoundly retarded. Now in addition to these numbers that they find from psychological testing, people, in order to be diagnosed as mentally retarded, must have their functioning level also evaluated. And the American Association of Mental Deficiency has a functional level, the ability for a person to have their behavior assessed for adaptive behavior, how well they function. A person may have "an IQ of 65" but they are able to go out and function. They can take care of themselves. They can do all of these things. They may be considered really a borderline individual as opposed to a truly retarded person because their adaptive functioning is within the normal range, or it might be just the opposite. A person may be only mildly retarded according to the scores that they score, but their adaptive behavior may be very low. They just for some reason, whether it is emotional or physical handicap or whatever, keep them from functioning at that level and their adaptive behavior may even be lower than their score. So they definitely would be considered within the retarded range.

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Diagnosing someone as retarded is not done by just any little, just one little criteria. It is done on the basis of numbered criteria but the most, the lowest functioning individual will be within the profound range. This person may be functioning at a mental age or a functioning level anywhere from one day to probably about six or eight, maybe eight months, maybe a year. These people, if they may be 25 and functioning at the level of a nine-month old individual, then they would generally be profoundly retarded. Their level of retardation can go beyond that.

Severely retarded people are generally functioning, if they are adults, like a person between two and three years old, something like that, sometimes four. Their abilities are concomitant with or similar to the person who is that young. This would be developmentally. Now they would have some other areas where they might be strong and would be able to function pretty well. Then you work your way up to the mildly retarded person who is functioning like you and me except for maybe their ability to lead or understand perhaps the written word.

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DEPOSITION OF VERNA FAIRCHILD

Direct Examination by Mr. McHugh:

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Q.134 Under this protocol, which is in Exhibit 16, how does the discharge procedure work for someone who is in a state facility for mental retardation?

A. I'd have to sit here and read this. It has been a year since I've written it.

Q.135 Are you involved on a day to day basis with these kinds of decisions?

A. With what kinds of decisions?

Q.136 Discharge from the facilities?

A. Not directly. On individual discharges?

Q.137 Yes.

A. Not directly, no sir.

Q.138 But these are the procedures that are followed, is that correct, the ones that are in Exhibit 16?

A. To my knowledge, yes.

Q.139 Would you be familiar in a general way with whether or not there have been in cases parental objections to placement in community facilities?

A. Yes sir.

Q.140 And under the discharge protocol, there is a procedure for persons to, either the guardian or the parents

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to object. Is that correct?

A. That is correct.

Q.141 Do you have any idea what the number of cases are in which parents have objected to the release of their children to community placements are?

A. Not offhand, no sir.

Q.142 Would it be less than 50?

A. I don't have any idea.

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DEPOSITION OF WILLIAM DRAPER

Direct Examination by Mr. McHugh:

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Q.71 Now, as you indicated, at this time there is a policy that if the guardian objects to a community placement, except in obvious cases, you are honoring that objection? Is that correct?

A. That's true.

Q.72 Now, what if the guardian and the parent are not the same person, what is the policy?

A. At this point, our policy is that if the parent objects, we would not proceed with the placement because the parent also has the right under KRS 210.270, they are recognized as someone who can object to that and who can offer the appeal and at this point it's simply the policy that either the parent or the guardian's objections will be honored because we feel we have an adequate number of people in our facilities for whom no objection is found who also need community placement that we can move with a steady progression into the community.

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Redirect Examination By Mr. Hugh:

Q.1 In terms of the KRS 210.270 procedure and the parental objections, at this time there is something extra there, not just the 210.270 procedure? Is that correct?

A. That's correct.

Q.2 In that you're supplying an extra deference to the parental objection, is that correct?

A. Yes.

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Q.7 From a professional and policymaking standpoint, is it preferable to have the professionals making the determination about what type of treatment or placement is appropriate for mentally retarded persons?

A. Yes. I don't think you can ever make that decision in a vacuum from the parent because just as in the case of this young man I described at Hazelwood, he is still very dependent on his mother's availability, her communication with him and also many of the parents do—they have anecdotal knowledge of how their child has functioned over the years. Now, if

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you listen to the parents as a body, they would say, "We know better what our child needs than any professional". And I can't totally refute that but on the other hand they also don't recognize the capability that the community has to support their son or daughter and to that extent they're not going to be willing to even consider that the professional may be right. But, yes, I think that the decisions as to where they reside should be primarily in the hands of the professional at the facility and the community mental health center and, in fact, if you look back at our own written policies, for instance, for Oakwood when it was initiated, it clearly indicates that this is a short-term placement, developmentally modeled in which the person leaves the community, goes into a facility for from one to three or four years normally, learns everything they can learn, the basic life skills, feeding toileting, those kinds of things, develops a capacity to do some kind of daily activities that both keep them occupied and move them upward and then they would go back in the community. The reason that has fallen apart, and it fell apart long before New Neighbors actually

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occurred, was that, pardon the reference, but I think you get something like squatter's rights once you're in there and especially if there is no community site to safely take them back out and there were some, before our time, there were some very unhappy endings to people moving summarily into the community just because, you know, Medicaid said they don't look like they qualify for ICF/MR anymore, if the community was not really ready to receive them, anything from ill health to abuse to even death occurred.

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Civil Action No. C 82-0738 L(A)

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Samuel Doe, by his Mother and next friend,
Mary Doe, on behalf of himself and all
others similarly situated, - - - - - - *Plaintiff,*

v.

Buddy Adams, and
Jack Farley, - - - - - - - - - - *Defendants.*

CLASS ACTION ORDER—Entered May 4, 1983

Upon motion of the plaintiff, the requirements of Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure being met, and the Court being fully advised,

It Is Ordered that this action be and it is hereby certified as a class action and that the class be designed as follows:

All mentally retarded persons in the Commonwealth of Kentucky who are presently committed or who may in the future be subjected to being committed to a state hospital, institution or other mental retardation residential treatment center involuntarily on the basis of their condition or mental retardation and who contend that said involuntary commitment violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the Constitution, 29 U.S.C. Sec. 794, KRS Chapters 202A, 202B 210, and 31.

Dated 5/4/83

/s/ Charles M. Allen
Charles M. Allen
Chief Judge

cc: Counsel of Record

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DEPOSITION OF PAUL MANN

Direct Examination by Mr. Kasdan:

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Q.5 In the course of your work at Hazelwood have you become familiar with the type of residents who are in Hazelwood?

A. Yes, I have.

Q.6 All right. Could you describe for the Court the residents—the types of residents that are at Hazelwood?

A. Okay. We serve a population of profoundly severely mentally retarded developmentally disabled residents who are non-ambulatory. The non-ambulatory characteristic is a requirement to admission to our facility.

I might add that although—at least ninety percent of our population falls into the profoundly retarded category. We have a handfull of severely retarded individuals. We have also one, maybe two, if I recall, residents currently who are moderately retarded.

Q.7 Is there any way to generalize about the individuals who fall within these classifications?

A. Yeah, that's how they fall.

Q.8 I'm speaking of what their

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abilities are based upon your observations of them at Hazelwood.

A. Yes. Typically—Our typical resident is profoundly retarded; is non-verbal; has no independent self-help-skills; is schedule trained perhaps but not toilet trained; has a very limited repertory of functional/social behaviors; tends toward self-stimulation, with self-abuse being part of that pattern; and requires environmental engineering to maintain an environmental focus rather than an austic like focus.

Q.9 Would you explain that last statement, please.

A. Self-referenced behavior, which is a generic term, including self-stimulatory behavior and other kinds of—yeah, self-referenced behavior.

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Q.99 I just want you to tell us what you as a clinician feel are the problems.

A. Yeah. Mental illness, which is—about which these statutes were initially drawn it seems to me, is of a much different nature than mental retardation.

With someone who is psychotic most generally there is—there is some kind of a more or less non-psychotic reference where this person should be in full possession of their rights. When this person

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loses the ability to act responsibly those rights are taken away, and that judgement is made in a legalistic way, as well as in a professional way. So, you're talking about a tractable illness, one that can change with doing with, treatment.

On the other hand, mental retardation is a retractable condition, one that doesn't change. People don't get better from mental retardation. They may learn to function—use the equipment they have, more or less, but mental retardation won't go away no matter how much treatment you provide.

So, an initial determination that someone is mentally retarded—if that determination is correct, you know, it is not going to change ever.

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Q.214 Can it happen that a mentally retarded person—persons functional ability will improve such that they don't require further institutionalization at some point? Can that happen?

A. It depends upon what person—what their initial starting point is. If you're talking of somebody who is—who is severe or upper severe range and above, sure, absolutely.

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I think there's a—a legitimate question as to whether a non-ambulatory and non-verbal profoundly retarded individual would be better served in one environment or the other.

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DEPOSITION OF KAREN MIDDENDORF

Direct Examination by Mr. Lawlor:

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Q. Was that policy in existence, as you understand it, at the same time you weren't able to get this information from the institution?

A. I'm not sure when the official word of the policy came out. I know all of the sudden the

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information dried up, and all we were able to get was sort of a . . . how can I put it . . . just very sketchy information that might say like John Doe, male, age twenty-three, and a diagnosis. We were able to get that sketchy kind of information.

We were told then that in order to . . . Let's see, I'm trying to remember how that policy came down . . . What was decided was that rather than sending out the full information on everybody, that they would . . . The facilities would have the responsibility to contact the families and tell them about the New Neighbors Program and gain their permission for further information to be shared with a district so that their son or daughter could be considered for placement.

Q. This parental objection policy that we have referred to, did it just involve residents where the parents made actual disapproval, or did you have similar problems with potential clients where the parents simply had not approved and did not actually disapprove?

A. We had both situations in our area. We had made the commitment in our district to bring back all of our folks from the facility.

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Q. Did you make efforts to obtain referrals from the Cabinet for Human Resources?

A. Yes, there were many meetings between Ed and Bill Draper and the MR/DD directors trying to resolve these issues. Everybody was concerned about it, but it was . . . you know, just a problem.

Q. When you say Ed, is that Ed Skarnulis?

A. Yes.

Q. During this period when you couldn't get the referrals that you mentioned and your continuing problems, were you aware of these four persons you referred to earlier in your testimony?

A. Yes.

Q. And why were they not placed?

A. Because of the policy of parental permission.

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Cross-examination by Mr. Kasdan:

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Q. Could you tell us a little bit about the kind of counseling services that you provide

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to the family of individuals who may be MR or DD?

A. Okay. It varies . . . For example, in the early childhood program, we seek to identify children as soon as they are born or as soon as it is identified that they have a handicap and begin working with that family very, very early, number one to accept the fact that their child has a handicap; two, make them aware of the kinds of interventions that can hopefully ameliorate the degree of that handicap; or can provide them some assistance and support so that they can better accept and make a normal life for that child.

We end up sometimes . . . We tend to work more in that area. Now, when a family has a real adjustment problem that is creating some real emotional problems for them, and that kind of thing, we tend to refer them to our mental health staff, who we feel are more appropriately trained to do that kind of in depth counseling.

But we do counsel in terms of the kinds of things that we can do to intervene, options parents have, and the kinds of supports that we can give them to make it easier for them to keep their child at home.

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And then with adults it is the same kind of thing. Often what we get into with parents of adults is having to counsel them in terms of letting go a little bit, of not over-protecting, of recognizing that their child, as they perceive them, is now an adult and needs to be doing adult kinds of things. We get into that kind of counseling.

Q. With regard to the historical perspective of the flow into and out of institutions of MR/DD people, have you seen any changes in that flow back and forth since you have been a Director of MR Services?

A. The major change is that we have not, to my knowledge, had anyone go into a state facility for at least five, probably six years from our district. We have made a commitment that that is absolutely the last, last option, that we will just do anything possible to provide the supports the family needs to provide the support in the community. And only as an absolute last option will we recommend facility placement for anyone from our district.

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Civil Action No. C 82-0738 L(A)

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Samuel Doe, et al., - - - - - - - - - *Plaintiffs,*

v.

Buddy Adams, and
Jack Farley, - - - - - - - - - - *Defendants.*

FINDINGS OF FACT, CONCLUSIONS OF LAW AND MEMORANDUM OPINION

This case is submitted to the Court on the motion of the plaintiff, Samuel Doe, for partial summary judgment against defendant Buddy Adams. Plaintiff is a mentally retarded person who has been institutionalized at Outwood for over ten years.

This action was brought on his behalf by his mother and next friend who contends that the defendant has refused to make available the pre-commitment and post-commitment procedural safeguards guaranteed under KRS 202A and 202B. More specifically, plaintiff alleges that every mentally retarded person who is committed to a Mental Retardation Residential Treatment Center (hereinafter MRRTC) may not be committed without a determination that he is mentally retarded, that he is a danger to himself or others, and that the least restrictive mode of treatment for that person requires placement in a hospital, institution or other MRRTC.

The Complaint notes that KRS 202B.050 provides: "All rights guaranteed by KRS Chapter [ ] 202A . . . to mentally ill persons shall apply to ~~mentally~~ retarded persons." Plaintiff further contends that defendant has complied with the provisions of KRS 202A, 203 and 902 KAR 12.010, insofar as the mentally ill are concerned, but has denied the mentally retarded those rights.

Plaintiff also contends that he has been denied his rights under the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment as well as his rights under 29 U.S.C. §794, KRS 202A, KRS 202B, KRS 210, and KRS 31.

Extensive depositions have been taken by the plaintiff and establish without contradiction that the mentally retarded, whether admitted by their parents or by a guardian related to them, or by a statutory guardian who is not related to them are admitted to the MRRTC without the benefit of any court hearing. Instead, upon the decision made by the defendant that the person for whom admission is sought is mentally retarded, such a person is admitted.

The undisputed evidence reflects that in the past few years, in only three cases concerning mentally retarded persons was a civil commitment proceeding instituted, and only one case in the last year. Is is also shown that approximately 1,100 petitions for involuntary commitment of mentally ill persons are filed yearly in Jefferson County alone; but since July 1982, not one case involving a mentally retarded person has been subject to the KRS 202B procedure.

The written admissions' policy of the defendant conditions admission on (a) the availability of appropriate alternative residential and training programs in the community, (b) the availability of appropriate training and living space within the recommended facility, (c) the severity of the applicant's handicap, and (d) the status of the family situation. These standards of admissibility are administered by the Records Review Committee (hereinafter RRC), a committee composed of various state employees, one of whom is a psychiatrist, with Dr. Susan Turner as chairperson for the past four years.

With respect to the confinement and release of persons placed in a MRRTC, it appears that the defendant, as a result of pressures from some parents of mentally retarded persons, has instituted an unwritten policy which gives to the parents of a mentally retarded person an absolute veto power the decision of the Committee, appointed by the MRRTC, to determine whether a mentally retarded person is suitable for release from a state MRRTC facility to alternative community placement.

This case is sequel to *Kentucky Association For Retarded Citizens* v. *Conn,* 510 F.Supp. 1233 (W.D. Ky. 1980), *aff'd,* 674 F.2d 582 (6th Cir. 1982), *cert. denied sub. nom., Bruington* v. *Conn,* ___ U.S. ___, 103 S.Ct. 457 (1982). In *Conn.,* among other holdings, the Court held that persons who are confined at MRRTC, Outwood, are, in fact, involuntary admissions with the exception of those very few who made their own applications to be admitted, and are entitled to the least restrictive alternative mode of treatment. *Id.* at 1235; 1249. We did not reach in that case, however, the question of whether a mentally retarded person had to go through a civil commitment proceeding prior to confinement in Outwood or in any other MRRTC.

Plaintiff contends, with regard to the admissions' policy of the defendants, that all persons who are in MRRTCs are involuntarily committed and that they must be accorded the same rights as are accorded to involuntarily committed mentally ill persons under the provision of KRS 202A. More specifically, plaintiff contends that no mentally retarded persons may be committed except under KRS 202B.040, and that once a person is committed, there must be reauthorization of commitment at least every 360 days; and further that if, at any time, the resident no longer meets the standards of commitment, he is entitled to release.

To bolster that contention, plaintiff argues that the doctrine of collateral estoppel must be applied to our holding in *Kentucky Association For Retarded Citizens* v. *Conn, supra,* and that every person is a MRRTC is involuntarily committed. Plaintiff also relies upon the provisions of KRS 202B.050 which provides that all rights guaranteed by KRS 202A and 210 to mentally ill persons shall apply to mentally retarded persons.

We proceed first to resolution of the collateral estoppel issue. The leading case on that issue is that of *Parklane Hosiery Co., Inc.* v. *Shore,* 439 U.S. 322 (1979), where the Supreme Court held that a party who had issues of fact adjudicated adversely to it in an equitable action could be collaterally estopped from relitigating the same issues before a jury in a subsequent legal action brought against it by a new party. In *Parklane,* the Supreme Court noted that collateral estoppel could only be applied against parties who had a "full and fair" opportunity to litigate their claims. *Id.* at 332.

Since *Parklane, supra, Hardy* v. *Johns-Manville Sales Corporation,* 681 F.2d 334 (5th Cir. 1982), states that in order for collateral estoppel to be invoked, the issue to be concluded must be identical to that in the prior action, it must have been actually litigated, and the determination made in the issue in the prior action must have been necessary and essential to the resulting judgment. *Id.* at 341.

Further, as stated in *Hardy* at 341, "[i]f it appears that a judgment may have been based on more than one of several distinctive matters in litigation and there is no indication which issue it was based on or which issue was fully litigated, such judgment will not preclude, under the doctrine of collateral estoppel, relitigation of any of the issues." (citing authorities).

In *Conn, supra,* the plaintiffs sought to prevent the defendants from constructing a new facility for 175 mentally retarded citizens. They also alleged violation of the Fourteenth Amendment by denial of the "right to treatment, right to the least restrictive alternative, and right to freedom from harm." *Id.* at 1237. At 1247, 48-49, the Court was concerned with the question of whether state law forbid the construction of the new Outwood; and if it did not, what were the rights of those people who would be residents of the new Outwood or who were residents of the old Outwood.

After holding that Kentucky did not ban the use of construction of new facilities for the treatment and care of mentally retarded persons, the Court went on to analyze the rights of persons who would be or who were confined at Outwood. We noted that KRS 202B.040 provided for a court determination before any person who was mentally retarded could be involuntarily committed. On pp. 1248 and 1249, the Court stated its belief that commitments of mentally retarded persons who were confined at Outwood were, in fact, involuntarily confined, with the exception of those very few who made their own applications to be admitted. The Court went on to hold that those few who were truly voluntary residents were entitled to release on their own requests.

In the judgment, the Court specifically declared that each resident confined at Outwood or to be confined at the new Outwood would be considered to be involuntarily committed, with the exception of those adult individuals who applied voluntarily. The judgment went on to state that the voluntarily confined residents were entitled to be discharged upon their application for discharge, and that the other residents were entitled to seek relief from actions approved by their guardians or committees for or against admission and discharge. *Id.* at 1235.

The Court went on to state in the judgment that each resident committed by the action of a guardian or committee is entitled to the rights set out in K.R.S. 202B.040 and 202B.060, and to release where a determination is made by an interdisciplinary team that the resident presents no immediate danger or threat of danger to self or others, and where the least restrictive alternative mode of treatment is in a living facility, and where there is in existence such a facility which can adequately treat and supervise the residents. *Id.* at 1235.

The Court has reviewed the briefs of the parties and in applying the doctrine of collateral estoppel, we note that the issue raised in the case at bar, relative to the allegedly improper admission of mental retarded persons, is not identical to the issue raised in *Conn,* and which the Court discussed, which was the right to the least.

It is noted at p. 1248, the Court was basically concerned with involuntary commitment in the context of the right to the least restrictive mode of treatment. The Court did not specifically determine that all mentally retarded persons were entitled to the protections associated to involuntarily committed mentally ill persons, or the protections set out in KRS 202B.040; but simply reached the decision that there was no merit to the argument made by the defendants that retarded persons were voluntary residents of MRRTCs and were not entitled to the least restrictive mode of treatment.

Believing that collateral estoppel does not bar the Court from in independent determination as to what the rights of mentally retarded persons are in the context of their admission to MRRTCs, we hold first that KRS 202B.050 and KRS 202B.020 mandate the hospitalization for the care and treatment of mentally retarded persons are to be provided in the same manner as hospitalization of mentally ill persons, as set forth in KRS 387, 210, 202A.020, 202A.231

and 202A.201; except that when a court appoints persons to examine allegedly mentally retarded persons, such persons, where possible, shall have made a study of mental retardation. Also, there is an exception that a qualified mental retardation professional may be substituted for one, but not both positions when certification is required for involuntary hospitalization. See KRS 202B.020.

KRS 202A.021 speaks in terms of voluntary admissions and allows any adult to be voluntarily admitted to a hospital upon his own application by an authorized physician. Any unemancipated person under 18 may be admitted to a mental hospital following his application signed by parent or guardian. Any child between the ages of 14 and 18 may admit himself or herself to a mental hospital, provided that the child's parent or legal guardian are notified immediately of the admission.

KRS 202A.021, (2), (3), and (4) allow a physician to discharge any voluntary patient, including anyone under 18 years of age, whose hospitalization he believes to be no longer necessary. In the alternative, if the voluntary patient request release, or if a child represented by a parent or committee requests release, or has a release requested by his parent or committee, he must be released unless further detained under other provisions of the statute. Also, at any time during the period of hospitalization, either the child or his parents or legal guardian may seek an independent medical review of the appropriateness of the decision to continue his confinement or to release him.

Since KRS 202B.020 specifically provides for hospitalization of mentally retarded persons by the same procedures as those set out in KRS 202A.021, it is readily apparent that any mentally retarded person under 18 years of age may be admitted by his parents or guardian, and that such admission in the eyes of the Legislature was to be treated as analogous to a voluntary admission.

We note in this connection that in the case of *Secretary of Public Welfare of Pennsylvania* v. *Institutionalized Juveniles*, 442 U.S. 640 (1979), the Supreme Court described the placing of mentally retarded and mentally ill children under 18 by application of their parents or guardians as being application for voluntary commitment. *Id.* 646, 47.

Our conclusion that the Legislature did not intend that all mentally retarded persons who were placed in MRRTCs should be considered as being involuntarily committed is fortified by the fact that KRS 202B.040 specifically refers to the due process procedures to be followed in the event of a mentally retarded person who was involuntarily committed. That section tracts the language found in KRS 202A.026. When KRS 202B.040 is considered, along with KRS 202B.020 and KRS 202A.021, it is apparent that the Legislature wished to differentiate between persons whom the authorities felt, for some reason, should be hospitalized in a MRRTC in the absence of an application by the guardian, committee or parents.

Analyzing further KRS 202A.021, it is significant to note that the only restrictions placed upon the admission of a child whose application is signed by a parent or guardian is that an authorized staff physician must grant permission for the admission. The statute then makes ample provision for the due process rights of the mentally ill person to be discharged at any time, since that decision may be accomplished by either the decision or a physician or the decision of the parents or guardian, unless the hospital authorities think release inadvisable, in which case the provisions for the involuntary confinement are brought into play.

We conclude, with respect to admissions, that the defendants are not violating the Equal Protection Clause of the Fourteenth Amendment. The mentally retarded person or child may not be confined in a MRRTC without the

approval of an Admissions Committee, which must consider the four criteria for admissions referred to on pages 2 and 3 of this opinion. Since that Committee has as one of its employees a psychiatrist, we believe that admission by it may be considered as equivalent to the admission of mentally ill persons by an authorized staff physician.

The Court notes that the only standard imposed upon the staff physician in KRS 202A.021 inferentially is that the person who has applied for admission is mentally ill or has symptoms of mental illness. While we would prefer, in light of *Parham* v. *J.R., supra,* that the committee be composed entirely of physicians, we not that in *Secy. of Public Welfare* v. *Institutionalized Juveniles, supra,* the mentally retarded children are admitted to the hospital on the application of parents or guardian, and the referral of a physician, accompanied by a medical or psychological upon the Director of the hospital the duty of making an independent examination of the child; and if the disagrees with the referring physician, the child must be discharged. If the child is admitted, then a staff conference is held and it is decided whether or not the child needs hospitalization.

Finally, we note that there is a class of mentally retarded persons who are, generally speaking, adults and who are committed to MRRTCs upon the application a State-appointed guardian, such as Maxine Pulliam. See *Conn, supra,* referring to the fact that 155 persons were admitted to Outwood as a result of an application filed by Maxine Pulliam, an employee of the State. The Supreme Court addressed this problem in *Parham, supra,* at pp. 617-19, where they stated that: although there are differences in the situation of persons who are wards of the State at the time of admission, as contrasted with the situation of children who have natural parents requesting admission, these differences are no so great as to require different procedures at the time of the child's initial admission to the hospital. The Court went on to state that there was no evidence that the State's application for admission was submitted for reasons unrelated to the child's need for treatment. *Id.* at 618.

We note the similarities between the procedures now employed by the defendants for the admission of mentally retarded persons and those employed for the voluntary admission of adults and children as provided in KRS 202A.021, KRS 202B.020 and KRS 202B.050.

We note also that KRS 202A.171 requires the discharge of an involuntary patient when he no longer meets the criteria for involuntary hospitalization. No specific reference is made in KRS 202B.020 and KRS 202A.171. However, since KRS 202B.050 guarantees the rights of KRS 202A to mentally retarded persons, it follows that an involuntary mentally retarded person must be discharged when he no longer meets the criteria for confinement set out in KRS 202B.040. Again, that type of proceeding and relief would apply only to the very small number of mentally retarded persons who are not admitted by the application of either a natural parent or a guardian and would not apply to the great majority who are considered to be voluntarily confined.

Finally, we note that the policy of the defendant, allowing parent an absolute veto power over the decision of the Release Committee to place a mentally retarded person in the community, is in conflict with the holding in *Parham* v. *J.R., supra.* In *Parham,* the Court held that its precedent allowed parents to retain a substantial, if not dominant, role in the decision to voluntarily admit their children to mental hospitals. The Court also concluded that the child's rights and the nature of the commitment decision are such that the parents cannot always have absolute and unreviewable discretion in deciding whether to have a child institutionalized. Of course, they retain plenary authority to seek such care for their children, subject to a doctor's

independent examination and medical judgment. See 442 U.S. at 604.

The amicus curiae relies upon the most recent decision in *Halderman* v. *Pennhurst State School & Hospital,* 707 F.2d 702 (3rd Cir. 1983). In that case, a two-to-one decision was entered holding that the district court erred when it held that a mentally retarded person could be transferred from Pennhurst, the state institution for the mentally retarded, where he had resided for over nine years, to a community living arrangement (hereinafter CLA). The district court had mandated that individual habilitation plans (IHPs) be developed supporting the transfer of Pennhurst School age residents to CLAs. Parents were allowed to participate as members of their child's IHP team, but parental consent to a transfer was not required. The IHP was to be submitted first to a court appointed master; and if the parents objected to the recommendations of the IHP, they could demand a hearing to determine whether the Pennhurst arrangements were more beneficial to the resident's habitation than the living arrangements in the community. The master would then make a report which could be excepted to by the parents and then heard by the district court.

Circuit Judge Aldisert, who wrote the majority opinion, held that the "district court did not afford to the parents' views the consideration that the Constitution demands." *Id.* at 711. Judge Aldisert stated that parents have a substantial right to direct the upbringing of their minor children, which can only be overcome either by a showing of abuse or neglect or by proof of a significant governmental interest running counter to the express parental desires. He then went on to hold that since there was evidence, both for and against the transfer decision, there was insufficient proof of a significant governmental interest to negate the parents' substantial constitutional rights. *Id.* at 710.

Circuit Judge Rosenn, in his concurring opinion, stated that he believed that when "parents' interests clearly collided with the interest of their minor child, whatever authority parents may ordinarily possess is necessarily subordinated to the child's best interest, notwithstanding the recognized right of parents in the well-being of their children." *Id.* at 712.

Judge Rosenn went on to hold that although the parents did not have an absolute right in the case, the master should have ordered a transfer only if there were a compelling justification for the transfer. He based his opinion, in part, upon the discussion in *Parham* v. *J.R., supra,* to the effect that there is a fundamental presumption that parents act in the best interest of their children, quoting *Parham,* 442 U.S. at 602.

In his dissenting opinion, Circuit Judge Sloviter pointed out that where the parents have voluntarily relinquished custody of a child to a mental retardation facility, the parental constitutional right referred to by Judge Aldisert could not govern the decision in *Halderman, supra.* He also pointed out that *Parham, supra,* requires some kind of inquiry by a neutral fact-finder to determine whether the statutory requirements for admission are satisfied, citing 442 U.S. at 606. Again, as Judge Sloviter noted, the parents did not have the final decision-making authority when the child's liberty interest was at stake.

Also, as Judge Sloviter pointed out, the court was concerned with the child's separate constitutional rights, and the court could not necessarily rely upon the parental authority to vindicate the child's independent interest. However, the parents should be given a full opportunity to show that interest in the decision was congruent with the child's best interest and right.

We believe that this analysis of *Halderman, supra,* reflects that even Judge Aldisert did not take the view that parents have an absolute veto power over the decision of a neutral fact-finder to release a mentally retarded child. It it true though, as pointed out by Judge Sloviter in his dissent, that although both Judge Aldisert and Judge Rosenn disclaim that the right of the parents to an absolute veto, they in effect held that one existed.

This Court's analysis of *Parham, supra,* and *Halderman, supra,* results in our holding that the defendants cannot allow parents to veto a decision made by a neutral committee or decision-maker as to the release of their child, although the committee certainly must give much weight to the opinions of the parents and to their part in the process of determining whether the child should be transferred.

A partial summary judgment in accordance with these findings of fact, conclusions of law has been entered this day.

Dated 3/28/84

/s/ Charles M. Allen
Charles M. Allen, Chief Judge.

cc: Counsel of Record

Civil Action No. C 82-0738 L(A)

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Samuel Doe, et al., - - - - - - - - - *Plaintiffs*,

v.

Buddy Adams, and
Jack Farley, - - - - - - - - - *Defendants*.

PARTIAL SUMMARY JUDGMENT

Plaintiff, having moved for partial summary judgment, and the Court, having reviewed the briefs of the parties, the depositions and papers on record, and being fully advised in the premises, and having filed its findings of fact, conclusions of law and memorandum opinion,

It Is Ordered And Adjudged that the motion for partial summary judgment be and it is hereby denied insofar as it pertains to plaintiffs' claims that mentally retarded persons should not be placed in Mental Retardation Residential Treatment Centers (MRRTC) without a court determination of dangerousness and mental retardation, and that the least restrictive alternative mode of treatment for that person requires placement in a hospital, institution or other MRRTC.

It Is Further Ordered And Adjudged that the motion for partial summary judgment, insofar as it pertains to the policy of the defendants in allowing parents an absolute veto power over the decision of the Release Committee to place a mentally retarded person in the community is sustained.

It Is Further Ordered And Adjudged that this is not a final and appealable judgment.

Dated 3/28/84

/s/ Charles M. Allen
Charles M. Allen, Chief Judge

cc: Counsel of Record

Civil Action No. C 82-0738 L(A)

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

SAMUEL DOE, et al., - - - - - - - - *Plaintiffs,*

v.

ELBERT AUSTIN, Secretary, Cabinet for Human
Resources, et al., - - - - - - - *Defendants.*

MEMORANDUM OPINION—Entered Jan. 9, 1986

This action is submitted to the Court on the plaintiffs' motion for reconsideration pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. Plaintiffs seek reconsideration of that portion of this Court's March 28, 1984, memorandum opinion and order which denied plaintiffs' claims regarding the admissions process to Mental Retardation Residential Treatment Centers [hereinafter "MRRTC"]. More specifically, plaintiffs' motion requests the Court to make available to the mentally retarded the procedural protections established for them by state statute. Defendants, on the other hand, move for partial summary judgment in their favor on the same issue.

The record reveals that approximately 800 mentally retarded persons are confined in MRRTCs. Of these 800 persons, 100 are moderately or mildly retarded, 222 are severely retarded, and 487 are profoundly retarded. Plaintiff, Samuel Doe, was placed at the Outwood State Hospital at the age of eighteen under the authority, care and custody of the Secretary of the Kentucky Cabinet [formerly "Department"] for Human Resources. Several years after he had become a resident, he was adjudicated incompetent in 1976 at the initiation of the state. Soon thereafter, his mother, Mary Doe, was appointed legal guardian. He now has been subjected to confinement for over thirteen years.

The record also reveals that the criteria for admission to a mental retardation facility is determined by (a) the availability of appropriate alternate residence and training programs in the community, (b) the availability of appropriate living and training space within the recommended section, (c) the severity of the applicant's handicap, and (d) the status of the family situation. In addition, it is the custom of the defendants to consider an admission voluntary if the retarded person signs what is known as a bill of rights form. The record reveals that if the retarded person is unable to understand the procedures of admission, the procedure is explained to the family accompanying him. If the family agrees to it, and if the individual signs the application with an x or is able in any other way to let the defendants know whether he or she wants to be admitted, then that individual is considered a voluntary admission.

The record further reveals that no civil proceedings with regard to admissions have ben instituted. The defendants consider this appropriate because they believe that nearly all admissions are voluntary rather than involuntary. The record also reveals that only two court proceedings have taken place with reference to a resident's request for release.

The plaintiffs' brief in support of reconsideration points out that this Court, in effect, previously focused erroneously on the constitutionality of the defendants' informal admission system rather than on the constitutionality of the class members' exclusion from the statutory system provided by KRS 202B. Plaintiffs emphasize that they are not challenging the constitutionality of KRS 202A or 202B, but rather, are challenging the rights of the state under due process and equal protection considerations. Likewise, plaintiffs correctly note that in *Kentucky Association for Retarded Citizens* v. *Conn*, 510 F.Supp. 1233 (W.D. Ky. 1980), *aff'd*, 674 F.2d 582 (6th Cir.), *cert. denied*, 459 U.S. 1041 (1982), this Court held that the great majority of profoundly and severely mentally retarded persons are simply incapable of making decisions as to whether it is in their best interest to be placed in a MRRTC.

In light of the holdings in *Parham* v. *J.R.*, 442 U.S. 584 (1979), and *Secretary of Public Health of Pennsylvania* v. *Institutionalized Juveniles*, 442 U.S. 640 (1979), we have little doubt that the state may constitutionally provide for the admission of mentally retarded persons, at least with respect to minority patients, the informal procedures which are now used by the state in admitting nearly all patients. However, in the instant case, the Commonwealth of Kentucky did not choose to legislate for procedures similar to those discussed in *Parham* and *Institutionalized Juveniles*. Instead, the legislature chose to guarantee to mentally retarded persons all of the rights guaranteed to mentally ill persons by KRS 202A and 210. Having created these due process rights, the question is whether the state may deny them by resorting to practices and procedures which are not in accord with the practices and procedures afforded to mentally ill persons.

As previously mentioned, plaintiffs are attacking the defendants' informal procedures as a violation of due process and equal protection. With respect to due process, plaintiffs rely, *inter alia*, on *Cleveland Board of Education* v. *Loudermill*, 105 S.Ct. 1487 (1985), *Mills* v. *Rogers*, 457 U.S. 291 (1982), and *Vitek* v. *Jones*, 445 U.S. 480 (1980), as well as this Court's opinion in *Karc*, for the proposition that once the mentally retarded have a liberty interested created by the state, the state cannot extinguish it by failing to follow

its own legislative due process procedures. While this Court believes that the plaintiffs have been granted a liberty interest by KRS 202A and 202B as well as by the holdings in *Youngberg* v. *Romeo*, 457 U.S. 307 (1982), *Vitex* v. *Jones*, *Karc*, and *Association for Retarded Citizens* v. *Olson*, 561 F.Supp. 473 (D. N.D. 1982), none of the plaintiffs' cases on the due process issue reached the result contended for by the plaintiffs, viz., what due process should be extended to the plaintiffs once a court has reached the conclusion that they posses a state created liberty interest.

In *Vitek* v. *Jones*, although the Court approved of the specific due process procedures set out by the district court, it did not in any way state that these procedures were the same as those set out for non-prisoners who were involuntarily confined to a mental hospital. In *Loudermill*, the Court stated that "once it is determined that the Due Process Clause applies, 'the question remains what process is due.' " 105 S.Ct. at 1493 (quoting *Morrissey* v. *Brewer*, 408 U.S. 471 (1972). The answer to that question, according to the Court, was "not to be found in the Ohio statute." *Id.*

In conclusion, we believe that although a liberty interest is created in the plaintiffs with regard to so-called voluntary admissions, the procedures followed by the state are sufficiently analogous to those followed in *Parham* and *Institutionalized Juveniles* to meet the requirements of procedural due process.

Although the plaintiffs cannot prevail upon the due process issue, they to prevail upon the equal protection issue. Kentucky has explicitly provided that mentally retarded persons shall have the same due process rights as mentally ill persons. In *Baxstrom* v. *Herold*, 383 U.S. 107 (1966), a prisoner named Baxstrom was certified as insane by a prison physician and transferred to a prison mental hospital. Later, when his penal sentence was about to expire, the State of New York civilly committed him following a proceeding in the chambers of a Surrogate, at which Baxstrom appeared alone. Medical certificates were filed by the state and indicated that two examining physicians believed Baxstrom was still mentally ill and in need of institutional care. The Surrogate signed a certificate which indicated he was satisfied that Baxstrom would require care and treatment in an institution for the mentally ill. Following that hearing, Baxstrom was retained at the state prison mental institution.

Under New York law, all persons civilly committed because of mental illness were granted the right to a jury trial, except those who were committed at the expiration of a penal term. The Supreme Court held that Baxstrom's equal protection rights were violated because all persons who were mentally ill should have been granted the right to a jury trial and no rational basis existed for distinguishing between persons who had been confined in prison and those who had not been so confined. The Court also held that the state did not have the right to deny Baxstrom a judicial proceeding to determine whether he was dangerous and should be confined in a prison rather than in a civil mental institution.

In *Jackson* v. *Indiana*, 406 U.S. 715 (1972), Jackson was a mentally defective person who had been charged with two robberies. After a competency hearing was held by the court to determine whether Jackson could stand trial, the court ordered him committed to the Department of mental Health until such time as the department would certify that he was sane.

The Supreme Court held that Jackson was deprived of equal protection because the Indiana statutes for commitment of mentally ill or "feeble-minded" persons afforded protections which were not available or granted to Jackson when he was committed under Indiana's pretrial commitment statute for incompetent criminal defendants. Under this statute, a court could find that a person was incompetent to stand trial and therefore should be confined to a mental institution without any statutory provision for periodic review of the defendant's condition or opportunity for release. In the words of the Court, "by subjecting Jackson to a more lenient commitment standard and to a more stringent standard of release than those generally applicable to all others not charged with offenses, and by condemning him to permanent institutionalization without the showing required for commitment or the opportunity for release afforded by [Indiana's other two commitment statutes], Indiana deprived [Jackson] of equal protection of the laws under the Fourteenth Amendment." *Id.* at 730.

Here Kentucky has decreed by legislative fiat that the mentally ill and the mentally retarded are to be treated alike with minor exceptions. Having declared that they shall be treated in the same manner, we believe that it is a violation of equal protection for the defendants to treat them differently.

The problem is the case at bar is created primarily by the legislature's sweeping determination in KRS 202B.050, which states that "[a]ll rights guaranteed by KRS Chapters 202A and 210 to mentally ill persons shall apply to mentally retarded persons." With this provision in mind, we must examine the provisions of KRS 202A and compare them with the practices and procedures of the defendants in construing Chapter 202B.

KRS 202A.021 provides that an authorized staff physician may admit for observation, diagnosis, care and treatment any person who is mentally ill or who has symptoms of mental illness and who applies voluntarily therefor. The practice followed by the defendants allows voluntary admissions for mentally retarded persons as previously outlined. These procedures are analogous to the procedures which the state defendants follow in admitting mentally retarded persons whom they contend are voluntarily committed. Also, the provisions contained in KRS 202A.021(1) allow children under eighteen who are mentally ill or who have symptoms of mental illness to be admitted provided the child's parents or guardian apply for admission and sign the application in the presence of two witnesses. A child fourteen years of age or older may admit himself or herself to a hospital for evaluation with the consent of a treating or admitting physician, provided that the child's parents or legal guardian are notified immediately of the admission and of their right to seek discharge.

We believe that insofar as mentally retarded persons under eighteen years of age are concerned, they are granted substantially the same rights by the defendants in the practices and procedures which they now follow. In other words, they are admitted upon the application of their parents or guardian and upon the recommendation of the Records Review Committee, which includes at least one psychiatrist.

We also believe that the defendants may admit mentally retarded person who are mildly or moderately retarded and who are over eighteen where those persons in their individual capacities make an application to be admitted to a mental retardation facility, but not in those instances where the application is made by parents, guardians, committee or at the instance of the state.

Finally, we believe that as to those persons who are profoundly or severely retarded and who are over the age of eighteen, the state defendants may not follow the procedures now used. Those persons must be considered as involuntarily committed even though the procedure now followed is called a voluntary admission and even though the so-called voluntary admittee signs the form prescribed by the state defendants. All of these persons, regardless of the wishes of their parents, guardians or the RRC, are entitled to the privileges set out in KRS 202B.040 and may not be committed unless a court makes the determinations required under that statute.

While KRS 202B does not delineate the specifics as to how and when the determination is to be made, KRS 202A.041 requires a preliminary hearing by the court within five days from the date of arrest of a suspected mentally ill person and then a final hearing within twenty-one days of the date of arrest to determine if the person should be involuntarily hospitalized for a period of sixty days. In addition, KRS 202A.071 and .076 require a preliminary hearing not less than six days from the date of the mentally ill person's detention and a final hearing within twenty-one days from the date of detention with a jury unless the mentally ill person and his or her attorney waive the right to a jury trial.

It is of course obvious that the great majority of mentally retarded persons who are profoundly or severely retarded are not brought for admission to MRRTCs as the result of an arrest. However, as it is typically the decision of parents or guardian to have the mentally retarded person admitted and as that decision then triggers the application procedure, it would seem that the date of application and actual admission, which are usually the same, should be considered as analogous to the date on which arrest occurs in the case of a mentally ill person. With that in mind, it would seem that in order to provide equal protection to the profoundly and severely retarded, the procedures set out in KRS 202A.071 and .076 must be followed.

The plaintiffs have wisely recognized that it will not be easy for the defendants to meet immediately the burdens which this decision places upon them. Therefore, the Court believes that the plaintiffs' suggestion of a sixty day continuance should be granted in order for the parties to work out the details of the procedures to be followed for profoundly and severely retarded persons who are over eighteen years of age.

Finally, we note defendant's argument that any orders entered by the Court requiring them to follow the state procedures advocated by the plaintiffs would result in a violation of the Supreme Courts mandate in *Pennhurst State School and Hosp.* v. *Halderman*, 465 U.S. 89 (1984). *Pennhurst* holds that a federal court may not grant injunctive relief against state officials on the basis of state law, whether prospective or retroactive. In interpreting the Eleventh Amendment, the Court stated:

> A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater instrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. *Id.* at 106.

In the case at bar, it is true that the state defendants are not following the dictates of their own statutes. However, this Court's grant of relief is not predicated upon that finding, but rather upon the constitutional principle of equal protection, that is, that a state may not deprive its citizens of the equal protection of its laws by unevenly and discriminatorily applying them.

Therefore, we have this day entered a partial summary judgment in accordance with this opinion.

/s/ Charles M. Allen,
Charles M. Allen, Senior Judge

cc: Counsel of Record

Civil Action No. C 82-0738 L(A)

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Samuel Doe, et al., - - - - - - - - *Plaintiffs,*

v.

Elbert Austin, Secretary, Cabinet for Human Resources, et al., - - - - - - - *Defendants.*

PARTIAL SUMMARY JUDGMENT

—Entered Jan. 9, 1986

The Court having entered its memorandum opinion, and being fully advised in the premises.

It Is Ordered And Adjudged that as to those persons who are over the age of eighteen years and who are profoundly or severely retarded, the defendants may not admit said persons to mental retardation residence treatment centers unless the procedures set out in KRS 202A.071 and 202A.076 are followed.

It Is Further Ordered, however, that this judgment shall not take effect for a period of sixty (60) days, during which time the parties shall meet together for the purpose of working out, if possible, a solution to the problem created by this partial judgment.

It Is Further Ordered that any part of the Court's March 28, 1984 opinion and order which are in conflict or inconsistent with the Court's memorandum opinion of this date and the partial judgment of this date be, and they hereby are, set aside.

This is not a final and appealable judgment.

Dated January 8, 1986

/s/ Charles M. Allen
Charles M. Allen, Senior Judge

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86 RS BR 1668/HSCS

[COMMONWEALTH OF KENTUCKY LOGO]
GENERAL ASSEMBLY
COMMONWEALTH OF KENTUCKY
REGULAR SESSION 1986

STATE COMMITTEE SUBSTITUTE FOR
HOUSE BILL NO. 477

TUESDAY, FEBRUARY 18, 1986

Committee on Judiciary-Civil reported the following bill which was ordered to be printed.

(4)[~~(3)~~] "Qualified mental retardation professional" means:

(a) A psychologist licensed under the provisions of KRS Chapter 319, who has either one year of specialized training for work with mentally retarded persons or one year of clinical experience with mentally retarded persons;

(b) A licensed registered nurse with a master's degree in psychiatric nursing from an accredited institution,with two (2) years of clinical experience. At least one (1) year of such experience shall be with mentally retarded persons, or he shall have one year of specialized training for work with mentally retarded persons;

(c) A certified social worker licensed under the provisions of KRS Chapter 335 or accredited by the academy of certified social workers, with two (2) years of clinical experience. At least one (1) year of such experience shall be with mentally retarded persons, or he shall have one year of specialized training for work with mentally retarded persons;

(d) A psychologist with a master's degree from an accredited institution who has been awarded a certificate of qualification by the Kentucky board of examiners of psychologists under the provisions of KRS Chapter 319, with two (2) years of clinical experience. At least one (1) year of such experience shall be with mentally retarded persons, or he shall have one year of specialized training for work with mentally retarded persons; and

(e) Other professional persons with similar training and experience who are qualified according to regulations promulgated by the secretary to participate in 72-hour involuntary hospitalization procedures under this chapter.

(5)[~~(4)~~] "Resident" means a person under care or treatment in a mental retardation residential treatment center pursuant to the provisions of this chapter;

(5) All terms defined in KRS Chapter 202A shall have the same meaning when used in this chapter.

Section 2. KRS 202B.040 is amended to read as follows:

When a person who is alleged to be mentally retarded is involuntarily committed, there shall be a determination that:

(1) He is a mentally retarded person;

(2) He presents (a) danger or a threat of danger to self or others;

(3) The least restrictive alternative mode of treatment requires placement in a hospital or mental retardation residential treatment center; and

(4) Treatment that can reasonably benefit the individual is available in the hospital or mental retardation residential treatment center.

(5) The application by parents or guardians for placement for their retarded family member or ward in any mental retardation treatment center shall not be considered and involuntary commitment under this section, provided the retarded family member's application has been evaluated by an interdisciplinary team as defined in KRS 202B.010 and the subsequent admission fully complies with the provisions of KRS Chapter 202B.

Section 3. KRS 202B.050 is amended to read as follows:

All rights guaranteed by KRS Chapters 202A *(other than those rights enumerated in KRS 202A.026 and 202A.051)* and *KRS Chapter* 210 to mentally ill persons shall apply to mentally retarded persons.

SECTION 4. A NEW SECTION OF KRS CHAPTER 202B IS CREATED TO READ AS FOLLOWS:

(1) Admission:

(a) Patients shall be admitted only upon the approval of a physician. The facility shall admit only persons who have a physical or mental condition which requires development nursing services and a planned program of active treatment;

(b) The interdisciplinary team shall:

1. Conduct a comprehensive evaluation of the individual, not more than three (3) months before admission, covering physical, emotional, social, and cognitive factors; and

2. Prior to admission define the need for service without regard to availability of those services. The team shall review all available and applicable programs of care, treatment, and training and record its findings;

(c) If admission is not the best plan but the individual must be admitted nevertheless, the facility shall clearly acknowledge that the admission is inappropriate and initiate plans to actively explore alternatives;

(d) Before admission, the resident and a responsible member of his family or committee shall be informed in writing of the established policies of the facility and fees, reimbursement, visitation rights during serious illness, visiting hours, type of diets offered and services offered; and

(e) The facility shall provide and maintain a system for identifying each resident's personal property and facilities for safekeeping of his declared valuables. Each resident's clothing and other property shall be reserved for his own use.

(2) Discharge planning. Prior to discharge the facility shall have a postinstitutional plan which identifies the residential setting and support services which would enable the resident to live in a less restrictive alternative to the current setting. Before a resident is released, the facility shall:

(a) Offer counseling to parents or guardians who request the release of a resident concerning the advantages and disadvantages of the release;

(b) Plan for release of the resident, to assure that appropriate services are available in the resident's new environment, including protective supervision and other followup services; and

(c) Prepare and place in the resident's record a summary of findings, progress, and plans.

Section 5. Whereas, Kentucky is currently under a federal court order relating to admissions to mental health facilities, an emergency is declared to exist, and this Act shall become effective upon its passage and approval by the Governor.

Civil Action No. C 82-0738 L(A)

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

SAMUEL DOE, et al., - - - - - - - - - *Plaintiffs,*

v.

ELBERT AUSTIN, Secretary, Cabinet for Human Resources, - - - - - - - - - - *Defendant.*

MEMORANDUM OPINION—Entered November 20, 1986

This action is presented to the Court on the motion of the Plaintiff for preliminary injunction and summary judgment, and on the motion of the Defendant for the Court to reconsider its opinion and partial summary judgment of January 9, 1986.

Since the opinion of January 9, 1986 was rendered, the Kentucky legislature amended K.R.S. Chapter 202B dealing with the commitment of mentally retarded persons. 1986 Ky. Acts ch. 79 (HB 477) at pp. 162-63. These amendments became effective on March 6, 1986 when approved by the Governor. Prior to the enactment of the amendments, the statute provided that "[a]ll rights guaranteed by K.R.S. Chapters 202A and 210 to mentally ill persons shall apply to mentally retarded persons." K.R.S. 202B.050 (1982). These rights included the procedural due process right to a preliminary and final judicial hearing in a district court of the Commonwealth of Kentucky to determine whether the mentally retarded individual should involuntarily be hospitalized in accordance with the applicable statutory criteria. K.R.S. 202A.051 and K.R.S. 202B.040 (1982).

The 1986 amendments (HB 477) effectively eliminated the rights of mentally retarded persons to a judicial hearing prior to involuntary commitment. K.R.S. 202B.050, as amended, reads as follows:

> All rights guaranteed by K.R.S. Chapters 202A (other than those rights enumerated in K.R.S. 202A.026 and 202A.051) and K.R.S. Chapter 210 to mentally ill persons shall apply to mentally retarded persons. *Id.*

Furthermore, a new subsection (5) was added to K.R.S. 202B.040 (1986), which now reads as follows:

> When a person who is alleged to be mentally retarded is involuntarily committed, there shall be a determination that:
>
> (1) He is a mentally retarded person;
>
> (2) He presents a danger or a threat of danger to self or others;
>
> (3) The least restrictive alternative mode of treatment requires placement in a hospital or mental retardation residential treatment center;
>
> (4) Treatment that can reasonably benefit the individual is available in the hospital or mental retardation residential treatment center; and
>
> (5) The application by parents or guardians for placement for their retarded family member or ward in any mental retardation treatment center shall not be considered an involuntary commitment under this section, provided the retarded family member's application has been evaluated by an interdisciplinary team as defined in K.R.S. 202B.010 and the subsequent admission fully complies with the provision of K.R.S. chapter 202B.

Thus, the statute now contemplates that many, if not most, commitments of the mentally retarded shall not even be considered involuntary. A new section, K.R.S. 202B.045 (1986), spells out the requirements for admission and discharge:

> (1) Admission:
>
> (a) Patients shall be admitted only upon the approval of a physician. The facility shall admit only persons who have a physical or mental condition which requires developmental nursing services and a planned program of active treatment;
>
> (b) The interdisciplinary team shall:
>
> 1. Conduct a comprehensive evaluation of the individual, not more than three (3) months before admission, covering physical, emotional, social, and cognitive factors; and
>
> 2. Prior to admission define the need for service without regard to availability of those services. The team shall review all available and applicable programs of care, treatment, and training and record its findings;
>
> (c) If admission is not the best plan but the individual must be admitted nevertheless, the facility shall clearly acknowledge that the admission is inappropriate and initiate plans to actively explore alternatives;
>
> (d) Before admission, the resident and a responsible member of his family or committee shall be informed in writing of the established policies of the facility and fees, reimbursement, visitation rights during serious illness, visiting hours, type of diets offered and services offered; and
>
> (e) The facility shall provide and maintain a system for identifying each resident's personal property and facilities for safekeeping of his declared valuables. Each resident's clothing and other property shall be reserved for his own use.

> (2) Discharge planning. Prior to discharge the facility shall have a postinstitutional plan which identifies the residential setting and support services which would enable the resident to live in a less restrictive alternative to the current setting. Before a resident is released, the facility shall:
>
> (a) Offer counseling to parents or guardians who request the release of a resident concerning the advantage and disadvantages of the release;
>
> (b) Plan for release of the resident, to assure that appropriate services are available in the resident's new environment, including protective supervision and other followup services; and
>
> (c) Prepare and place in the resident's record a summary of findings, progress, and plans.

Finally, the amendments define the "interdisciplinary team" as:

> the group of persons responsible for the diagnosis, evaluation and individualized program planning and service implementation for the resident. The team is composed of a physician, a psychologist, a registered nurse, a social worker, and other professionals, at least one (1) of whom is a qualified mental health professional, and may include the resident, the resident's family, or the guardian.

It will be recalled that, with regard to the statutory scheme in effect from 1982 until 1986, the previous opinion of the Court held that because it granted equal due process rights prior to involuntary commitment to both mentally retarded and mentally ill persons, the Commonwealth could not apply the statutes in a different way to these two classes of persons and thereby deprive the mentally retarded of their equal protection rights. The decision also held that it would not be a violation of the due process rights of mentally retarded persons for the state to commit such persons to mentally retarded institutions (hereinafter MRI) without a judicial hearing.

The Court, in that portion of the opinion relating to due process, relied heavily upon the decision of the Supreme Court in *Parham* v. *J.R.*, 442 U.S. 584 (1979). However, we have re-examined the case of *Clark* v. *Cohen*, 613 F.Supp. 684 (M.D. Pa. 1985) and its predecessor, *Dixon* v. *Attorney General of Commonwealth of Pa.*, 325 F.Supp. 966 (M.D. Pa. 1971), and now reach the contrary conclusion that it would be a violation of due process for Kentucky to involuntarily commit a mentally retarded person who is eighteen years of age or over without first awarding his a judicial hearing. Our opinion in this regard is strengthened by the very thorough analysis which District Judge Huyett undertook in *Clark* v. *Cohen, supra*, to show that there are indeed significant differences between the due process rights of adult mentally retarded persons and the rights of juveniles in a similar position. *Id.*, 613 F.Supp. at 697 *et seq.* As Judge Huyett noted,

> *Parham* dealt only with the commitment of minors by their parents or legal guardians. The Court's decision rested very heavily on the assumption that both parents and guardians act in the best interests of the child and that both have traditional authority over the raising of minors in their care. This aspect of *Parham* makes it inapposite to a situation involving someone who is not a minor. Once someone becomes an adult, one's parents lose that degree of authority found so crucial in *Parham*. Moreover, as even the *Parham* court found, there is a possibility (born [e] out by this case) that a 'ward' of the state who is committed may become 'lost in the shuffle.' *Id.* at 699, *citing Parham*, 442 U.S. at 619.

While an involuntary commitment to an MRI may be the most humane solution for a profoundly or severely retarded mentally retarded person who is unable to care for him or herself, it is still apparent that such commitment results in an extreme curtailment of personal liberty. Any decision by the state which results in such a profound a deprivation of personal liberty must be accompanied by substantial due process safeguards, particularly where the person who is to be committed may be lacking in the ability to fully protect his or her procedural rights. We therefore hold that mentally retarded persons over eighteen years of age are entitled to a judicial hearing and determination of the propriety of commitment, either prior to being involuntarily committed to an MRI or other facility, or as soon as practicable thereafter.

This holding applies equally to persons who are sought to be committed for the first time after they are eighteen and those who have been in the MRI prior to reaching eighteen but who then reach the age of eighteen. Of course, the state has the right to commit minors under the procedures that are now available under the statute and under the decision in *Parham*.

We also disagree with the statute's definition of what constitutes an "involuntary commitment." K.R.S. 202B.040(5) treats the application by parents or guardians for placement of their retarded family member or ward in any mental retardation center as voluntary, and thereby strips the mentally retarded adult of his or her rights to a *judicial* hearing and determination prior to commitment. As noted by this Court in *Kentucky Ass'n for Retarded Citizens* v. *Conn,* 510 F.Supp. 1233 (1980), *aff'd* 674 F.2d 582 (6th Cir.), *cert. denied* 459 U.S. 1041 (1982), many retarded adults are placed in MRI's by state appointed guardians who have no family ties with the mentally retarded person, and, even in those cases where the mentally retarded person is sought to be placed in an MRI by a relative or person who is also his legal guardian, the label of "voluntary commitment" cannot stand up in the face of the fact that the mentally retarded person is being committed without his or her consent. *Conn, supra,* 510 F.Supp. at 1248-49.

With regard to the equal protection argument, it is true that courts have stated that there are significant differences between the mentally ill and the mentally retarded. *See Kremens* v. *Bartley,* 431 U.S. 119, 135-36 (1977). However, the fact that there are significant differences between the mentally ill and the mentally retarded does not erase the principal that mentally ill persons and mentally retarded persons are in similar positions: each has a fundamental constitutional right not to be placed in an institution until a judicial hearing has taken place, and appropriate findings have been made that they pose a danger, or threat of danger, to self or others, and have met the other requirements set out in the statutes. *See* K.R.S. 202B.040 (mentally retarded); K.R.S. 202A.026 (mentally ill).

The statute, K.R.S. 202B, specifically requires that where a person who is alleged to be mentally retarded is involuntarily committed, the following determination shall be made: that he is mentally retarded, presents a danger or threat of danger to himself or others; that the least restrictive alternative mode of treatment is in a hospital or mental retardation residence treatment center; and that treatment that can reasonably benefit the individual is available in the hospital or mental retardation treatment center. K.R.S. 202B.040 (1986), The statute, however, does not explicitly prescribe who makes the ultimate determination as to whether these criteria have been met. It does provide that patients shall be admitted only on the approval of a physician. K.R.S. 202B.045 (1)(a). It also requires evaluation by the interdisciplinary team. K.R.S. 202B.010(1) and 202B.045. The statute, as amended, apparently even retains the requirement that the Secretary consent to the mentally retarded individual's commitment.

K.R.S. 202B.030. However, the statute no longer grants mentally retarded persons the right, granted to mentally ill persons under K.R.S. 202A.051, of having a judicial determination made as to the propriety of their involuntary commitment. *See* K.R.S. 202B.050 (1986). K.R.S. 202B therefore violates the equal protection clause because there is no rational basis for distinguishing between the mentally retarded and the mentally ill with regard to their initial involuntary confinement. Both categories of persons who are eighteen years of age or over must receive a judicial hearing.

We next come to the question of what significance the difference between mentally retarded and mentally ill persons entails insofar as it affects their right to periodic review of their commitment. The present law grants the mentally ill person the right of judicial review at least every 360 days after he or she has reached adulthood because he or she cannot be committed for a longer period. K.R.S. 202A.051 (1986). However, the present law does not grant the mentally retarded person judicial review of his or her indefinite commitment. In this connection, it is recognized that mentally ill persons may recover from their mental illnesses within relatively short periods after their judicial commitment, whereas severely and profoundly mentally retarded persons very rarely experience such dramatic improvements in their condition. This fundamental difference seems to indicate that the state could prescribe different modes of due process for the review of the commitment of severely and profoundly mentally retarded adults versus the review of the commitment of mentally ill adults. However, it is not our duty to spell out at this juncture what such due process procedures might be, and we have not yet been cited to any statute or decision which the parties contend controls the review rights of the mentally retarded adults.

Our only function at this time is to hold that there must be some judicial review, at some appropriate time, of the commitment of persons who are eighteen years or older and who are mentally retarded. Suffice it to say that the statute, as it now stands, is unconstitutional with respect to the right to a judicial hearing of mentally retarded adults prior to their involuntary commitment. *Clark* v. *Cohen*, 613 F.Supp. 684 (M.D. Pa. 1985).

We have this day entered a preliminary injunction and partial summary judgment in accordance with our opinion.

Dated 11-20-86

/s/ Charles M. Allen
Charles M. Allen, Senior Judge

cc: Counsel of Record

Civil Action No. C 82-0738 L(A)

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

SAMUEL DOE, et al., - - - - - - - - *Plaintiffs,*

v.

ELBERT AUSTIN, Secretary, Cabinet for Human
Resources, - - - - - - - - - - *Defendant.*

PRELIMINARY INJUNCTION AND PARTIAL SUMMARY JUDGMENT—Entered Nov. 20, 1986

Plaintiffs having moved for a preliminary injunction and summary judgment, and defendant having moved the Court to reconsider its opinion and partial summary judgment of January 9, 1986, and the parties having fully briefed the issues, and the Court being of the opinion that a hearing is unnecessary on the motion for a preliminary injunction,

IT IS ORDERED AND ADJUDGED as follows:

1. Defendants are enjoined from committing to a mentally retarded treatment center, or any other facility for treatment of the mentally retarded, any allegedly mentally retarded person who is over eighteen years of age without first granting him or her a judicial hearing to determine whether or not he or she should be committed under the standards set out in K.R.S. 202B.040 (1-4). Defendants are likewise enjoined from continuing to confine any allegedly mentally retarded person in any such institution after he or she reached his or her eighteenth birthday, unless there

is a judicial hearing and a judicial determination made that the standards set out in K.R.S. 202B.040 (1-4) have been met. Such judicial hearing shall take place not later than three months after the person already committed has reached the age of eighteen years. The confined mentally retarded person referred to in the preceding two sentences may continue to be confined between the time such person attains the age of eighteen years and the time he or she receives the required judicial hearing. Plaintiffs shall give security in the amount of $100.00. Rule 65 (c), Fed. R. Civ. Pro.

2. Plaintiffs are further granted partial summary judgment on the issue of the unconstitutionality of K.R.S. Chapter 202B, as amended, such statute being in violation of the due process and equal protection rights of the Plaintiff as set forth in the accompanying memorandum opinion.

3. The parties shall have sixty (60) days from the date of this order in which to meet and confer for the purpose of submitting to the Court an agreed compliance plan for the provision of judicial proceedings in accordance with the opinion entered this day.

Dated 11-20-86

/s/ Charles M. Allen
Charles M. Allen, Senior Judge

cc: Counsel of Record

No. 86-6274

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Samuel Doe, by his mother and
next friend, Mary Doe, - - - *Plaintiff-Appellee,*

v.

Elbert Austin, Secretary, Cabinet for
Human Resources, - - - *Defendant-Appellant.*

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*On Appeal from the United States District Court
for the Western District of Kentucky.*

Decided and Filed June 15, 1988

Before: KEITH, MILBURN, and NORRIS, Circuit Judges.

KEITH, Circuit Judge. Defendant Elbert Austin, Secretary, Cabinet for Human Resources for the Commonwealth of Kentucky, appeals the order of the district court granting a preliminary injunction and partial summary judgment in favor of plaintiffs, a certified class of mentally retarded persons already involuntarily committed or subject to involuntary commitment to a state-owned mental retardation residential treatment center (RTC) who had challenged the constitutionality of Kentucky's civil commitment scheme as applied to mentally retarded adults.[1]

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[1] Amici John Larry Voyles, Danny Dyer, Brian Shehan, the Parents and Relatives of Oakwood Facility, ICF/MR, Inc. (P.R.O.O.F) and concerned Families of Hazelwood Hospital, ICF/MR, Inc., parents and guardians of profoundly retarded individuals residing at Hazelwood Hospital, ICF/MR, filed a brief urging reversal.

For the following reasons, we AFFIRM in part and REVERSE in part.

Prior to 1986, and at the time that this matter was initiated, Kentucky provided a comprehensive statutory scheme to govern the involuntary civil commitment of the mentally ill, Ken. Rev. Stat. Ann. Chapter 202A (Baldwin 1982), which also governed the commitment of mentally retarded persons. Ken. Rev. Stat. Ann. § 202B.050.

Ken. Rev. Stat. Ann. Chapter 202A *et seq.* provided, in relevant part:

> (1) No involuntary commitment would take place unless the person to be committed (a) presented a danger or threat of danger to self or others; (b) could reasonably benefit from treatment; and (c) unless hospitalization represented the least restrictive mode of treatment, Ken. Rev. Stat. Ann. § 202A.026;
>
> (2) Although a staff physician could order an emergency admission, that physician must certify within twenty-four hours that an involuntary admission should occur, and any such emergency admission was limited to seventy-two hours, Ken. Rev. Stat. Ann. § 202A.031;
>
> (3) A preliminary hearing would be held in the district court within six days of the initial detention (or examination, if no emergency admission was sought), and a final hearing would take place within twenty-one days, Ken. Rev. Stat. Ann. § 202A.071;
>
> (4) The preliminary hearing although not required to be formal, would provide an opportunity for the person to be committed to testify, to present witnesses, and to cross-examine witnesses who had testified against her. Ken. Rev. Stat. Ann. § 202A.

076(1). The final hearing would provide the same safeguards; in addition, the rules of criminal procedure would apply, including the duty of the Commonwealth to prove beyond a reasonable doubt that confinement was warranted. Moreover, there was a right to a jury trial unless that right was waived. Ken. Rev. Stat. Ann. § 202A.076(2);

(5) The person to be committed had a right to counsel, Ken. Rev. Stat. Ann. § 202A.121, and a right to be present throughout the proceedings (unless this right was waived, or unless her conduct was unreasonably disruptive), Ken. Rev. Stat. Ann. § 202A.131;

(6) Discharge by an authorized staff physician during the prescribed period of involuntary commitment when the criteria for involuntary commitments were no longer met, Ken. Rev. Stat. Ann. § 202A.171;

(7) The opportunity for convalescent leave during the prescribed period of involuntary commitment, Ken. Rev. Stat. Ann. § 202A.181;

(8) A limitation of the prescribed period of confinement to sixty or three hundred sixty days without further judicial proceedings, Ken. Rev. Stat. Ann. § 202A.051.

Ken Rev. Stat. Ann. § 202B.050, before 1986, provided that all rights guaranteed by Ken. Rev. Stat. Ann. Chapters 202A and 210[2] would apply to mentally retarded persons. Section 202B.040 added the additional required determination to § 202A.026 that treatment that could reasonably benefit the individual be available in the hospital or mental retardation residential treatment center. Ken. Rev. Stat. Ann. § 202B.040(4). Furthermore, no mentally retarded person could be involuntarily hospitalized without the consent of the Secretary of the Cabinet for Human Resources, unless a determination of a concurrent mental illness requiring commitment was made pursuant to Chapter 202A. Ken. Rev. Stat. Ann. § 202B.030.

Despite the existence of this comprehensive statutory scheme, the Cabinet for Human Resources formed the Record Review Committee (RRC) for the purpose of controlling admissions to RTCs of mentally retarded persons. The RRC consisted of, at a minimum, a physician, a psychologist, a social worker, and a registered nurse. Procedurally, a parent or guardian was required to contact the local Comprehensive Care Center (operated by the Regional Mental Health-Mental Retardation Board), which would refer the mentally retarded person to the RRC. The written admissions policy of the Cabinet set out standards for admission:

> The suitability for admission to a mental retardation facility is determined by: a) the availability of appropriate alternative residential and training programs in the community, b) the availability of appropriate living and training space within the recommended facility, c) the severity of the applicant's handicap, and d) the status of the family's situation.

("Admissions Policies and Procedures for Mental Retardation Residential Facilities, " August 21, 1981).

The RRC procedure accounted for virtually all admissions of mentally retarded persons to RTCs; indeed, during 1982, 1983, 1984 and 1985, only one mentally retarded person was admitted pursuant to the statutory procedures for involuntary commitment. However, the Cabinet's view has consistently been that admissions under the RRC procedure, initiated by the parent or guardian, are voluntary in nature. Moreover, if the committed person was able to sign the Resident's Bill of Rights form which was presented at admission, by signature or by marking an "X," her admission was considered to be voluntary.

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[2] Ken. Rev. Stat. Ann. Chapter 210 *et seq.* codifies the institutional structure of Kentucky's mental health care system; it is not at issue in this appeal.

Once a person was admitted, his or her continued commitment was ostensibly evaluated according to the Mental Retardation Facility Discharge Protocol, based on Ken. Rev. Stat. Ann. § 210.270. That section provides a mechanism for community placements once the RTC staff determines that such placement is appropriate, including provisions for challenges to reclassification.[3]

The named plaintiff, Samuel Doe, was placed in 1971, at age eighteen, in the custody of what is now the Kentucky Cabinet for Human Resources. Under the authority of the Secretary of the Cabinet, he was institutionalized in the Outwood State Hospital, Dawson Springs, Kentucky. In 1977, while still at Outwood, he was adjudicated as incompetent at the initiation of the Commonwealth. Soon thereafter, his mother was appointed as his legal guardian. Doe has received no independent review of his confinement, judicial or otherwise, throughout the seventeen years of his institutionalization.

Plaintiffs brought this action pursuant to 42 U.S.C. § 1983 challenging the failure of Kentucky to provide the safeguards required by Ken. Rev. Stat. Ann. Chapters 202A and 202B. In its first memorandum opinion, the district court found that defendants had adopted a policy af allowing parents to exert an absolute veto over the decision to

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[3] Additionally, the Cabinet had adopted a policy which allowed parents an absolute veto over the decision to place their mentally ill children in community placements. This policy was held to be unconstitutional in the district court's first opinion, and it not at issue in this appeal.

release a patient to a community placement, and that such a practice was contrary to the holding of the Supreme Court in *Parham v. J.R.*, 442 U.S. 584 (1979). Memorandum Opinion of March, 28, 1984 (Memorandum I) at 13-17. The district court denied summary judgment in all other respects.

In its second memorandum opinion, the district court noted that because the great majority of profoundly and severely mentally retarded persons are incapable of making the decision as to whether admission into a RTC is in their best interest, all such admissions were to be considered involuntary. Memorandum Opinion of January 9, 1986 at 3, 9 (Memorandum II). It then concluded that, because Kentucky had declared that the mentally ill and the mentally retarded would be treated in the same manner, it constituted a denial of equal protection to apply the involuntary commitment statute to the mentally ill while refusing to make its provisions available to the mentally retarded. Memorandum II at 5-8.

In response to the district court's order, the Kentucky General Assembly amended Chapter 202B in an attempt to avoid the result reached by the district court. Ken. Rev. Stat. Ann. § 202B.050 was amended to read:

> All rights guaranteed by K.R.S. Chapters 202A (other than those rights enumerated in K.R.S. 202A.026 and 202A.051) and K.R.S. Chapter 210 to mentally ill persons shall apply to mentally retarded persons.

Ken. Rev. Stat. Ann. § 202B.050 (Baldwin 1986). Moreover, Ken. Rev. Stat. Ann. § 202B.040, listing the requirements for admission, was amended to include a fifth subsection:

> When a person who is alleged to be mentally retarded is involuntarily committed, there shall be a determination that:

(1) He is a mentally retarded person:

(2) He presents a danger or a threat of danger to self or others;

(3) The least restrictive alternative mode of treatment requires placement in a hospital or mental retardation residential treatment center;

(4) Treatment that can reasonably benefit the individual in the hospital or mental retardation residential treatment center; and

(5) The application by parents or guardians for placement for their retarded family member or ward in any mental retardation treatment center shall not be considered an involuntary commitment under this section, provided the retarded family members' application has been evaluated by an interdisciplinary team as defined in K.R.S. 202B.010 and the subsequent admission fully complies with the provisions of K.R.S. Chapter 202B.

Ken. Rev. Stat. Ann. § 202B.040 (1986). The effect of this amendment was to define most admissions as technically "voluntary," without reference to the actual or independent wishes of the person to be committed.

Finally, a new section, Ken. Rev. Stat. Ann. § 202B.045 (1986), codified new requirements for admission and discharge:

(1) Admission:

(a) Patients shall be admitted only upon the approval of a physician. The facility shall admit only persons who have a physical or mental condition which requires developmental nursing services and a planned program of active treatment:

(b) The interdisciplinary team shall:

1. Conduct a comprehensive evaluation of the individual, not more than three (3) months before admission, covering physical, emotional, social, and cognitive factors; and

2. Prior to admission define the need for service without regard to availability of those services. The team shall review all available and applicable programs of care, treatment, and training and record its findings;

(c) If admission is not the best plan but the individual must be admitted nevertheless, the facility shall clearly acknowledge that the admission is inappropriate and initiate plans to actively explore alternatives;

(d) Before admission, the resident and a responsible member of his family or committee shall be informed in writing of the established policies of the facility and fees, reimbursement, visitation rights during serious illness, visiting hours, type of diets offered and services offered; and

(e) The facility shall provide and maintain a system for identifying each resident's personal property and facilities for safekeeping of his declared valuables. Each resident's clothing and other property shall be reserved for his own use.

(2) Discharge planning. Prior to discharge the facility shall have a postinstitutional plan which identifies the residential setting and support services which would enable the resident to live in a less restrictive alternative to the current setting. Before a resident is released, the facility shall: (a) Offer counseling to parents or guardians who re-

> quest the release of a resident concerning the advantages and disadvantages of the release; (b) Plan for release of the resident, to assure that appropriate services are available in the resident's new environment, including protective supervision and other followup services; and (c) Prepare and place in the resident's record a summary of findings, progress, and plans.

The "interdisciplinary team" was defined as:

> the group of persons responsible for the diagnosis, evaluation and individualized program planning and service implementation for the resident. The team is composed of a physician, a psychologist, a registered nurse, a social worker, and other professionals, at least one (1) of whom is a qualified mental health professional, and many include the resident, the resident's family, or the guardian.

Ken. Rev. Stat. Ann. § 202B.010(1) (1986). As the district court noted, "[t]he 1986 amendments (HB 477) effectively eliminated the rights of mentally retarded persons to a judicial hearing prior to involuntary commitment." Memorandum Opinion of November 20, 1986 (Memorandum III).

Plaintiffs moved for a summary judgment declaring HB 477 unconstitutional, while defendant moved for reconsideration of the district court's opinion and partial summary judgment of January 9, 1986. On November 20, 1986, the district court (a) reconsidered its previous holding that Kentucky's commitment procedures conformed with due process, and held that due process required a judicial hearing prior to commitment; (b) found that Kentucky could not define applications by parents or guardians for placement as "voluntary," Ken. Rev. Stat. Ann. § 202B.040(5) (1986); and (c) reaffirmed that equal-protection required a judicial hearing. Defendant appeals.

II.

Involuntary civil commitment to a mental institution represents "a massive curtailment of liberty," requiring due process protection. *Vitek* v. *Jones*, 445 U.S. 480, 491-92 (1980); *Humphrey* v. *Cady*, 405 U. S. 504, 509 (1972). Indeed, the liberty deprivation resulting from involuntary commitment is more than a loss of mere physical freedom; the stigma which attaches upon entry to a mental health facility can have a profound impact upon individual liberty. *Addington* v. *Texas*, 441 U.S. 418, 425-26 (1979).

The Commonwealth does not contend that it may confine persons thought to be mentally retarded without providing any degree of due process. Instead, the Commonwealth argues that: (A) the named plaintiff does not have standing to pursue the class action because his confinement is, in fact, voluntary; and (B) the due process requirement is satisfied by an administrative procedure such as the one now provided by the Commonwealth, rather than requiring a judicial officer.

A.

As stated above, appellant's argument that Samuel Doe lacks standing to challenge the legality of his confinement depends on the voluntariness of both his initial and continued commitment. If, as appellant contends, Doe entered the RTC voluntarily, and remains voluntarily, he would not present a controversy for adjudication.

However, we note that appellant has a view of "voluntary" behavior which is, to say the least, expansive. By legislative fiat, the Commonwealth has deemed admissions initiated by a parent or guardian to be voluntary, with no regard for the actual wishes of the committed person. Ken.

Rev. Stat. Ann. § 202B.040(5) (1986). In fact, as stated by the district court:

> As noted by this Court in *Kentucky Ass'n for Retarded Citizens* v. *Conn*, 510 F. Supp. 1233 (1980), *aff'd* 674 F. 2d 582 (6th Cir.), *cert. denied*, 459 U.S. 1041 (1982), many retarded adults are placed in [RTCs] by state appointed guardians who have no family ties with the mentally retarded person, and, even in those cases where the mentally retarded person is sought to be placed in an [RTC] by a relative or person who is also his legal guardian, the label of "voluntary commitment" cannot stand up in the face of the fact that the mentally retarded person is being committed without his or her consent. *Conn, supra*, 510 F. Supp. at 1248-49.

Memorandum Opinion at 6.

We recognize that the Supreme Court has, at least implicitly, viewed the commitment of a minor to a mental facility by a parent or guardian, subject to review by a neutral factfinder, as a voluntary admission. *Parham* v. *J.R.*, 442 U.S. 524 (1979); *Pennsylvania* v. *Institutionalized Juveniles*, 442 U.S. 640 (1979). However, as we discuss more fully in Section IIB, *infra*, minor children simply do not stand in the same position as adults with their parents. The traditional interrelationship of interests shared by parents and their minor children is not as presumptive as the minor passes from childhood to adulthood.

Likewise, the notion that the continuing confinement of the class members is voluntary notwithstanding the possible involuntariness of their initial confinement is, at best, an illusion. Indeed, the practice of relying upon some affirmative act on the part of profoundly and severely retarded persons to signal their will to escape confinement, coupled with the presence of a parent or guardian who may have played a pivotal role in institutionalizing the admittee in the first instance, creates a quite palpable danger that the adult child will be "lost in the shuffle." Cf. *Parham*, 442 U.S. at 619. We decline to adopt a measure of voluntariness for the commitment of adults that favors form over substance.[4] Therefore, we agree with the district court that the commitment of mentally retarded adults by the Commonwealth upon application by a parent or guardian is to be considered involuntary.[5]

B.

The district court, relying upon the analysis of *Clark* v. *Cohen*, 613 F. Supp. 684 (M.D. Pa. 1985), *aff'd*, 794 F. 2d 79, *cert. denied*, 107 S. Ct. 459 (1986) (and its predecessor, *Dixon* v. *Attorney General of Commonwealth of Pennsylvania*, 325 F. Supp. 966 (M.D. Pa. 1971)), held that it would be a violation of due process for the Commonwealth to involuntarily commit a mentally retarded adult without a prior *judicial* hearing. Memorandum Opinion at 4. On appeal, the Commonwealth argues that the due process claim asserted by appellees is controlled by *Parham, supra.*

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[4] For the same reasons, we cannot conclude, as amici argue, that the due process protections which are a part of the formal guardianship hearing, KRS 387.500 *et seq.*, vitiate the need for a hearing at the time of commitment. Moreover, the drastic curtailment of liberty which physical commitment represents makes a guardianship proceeding, which may have occurred at some time long before the actual confinement, a poor substitute for a contemporaneous hearing.

[5] Of course, because these admissions are involuntary, a determination must be made pursuant to § 202B.040 that the admittee presents a danger or a threat of danger to self or others, that confinement in a hospital or RTC represents the least restrictive alternative mode of treatment, and that reasonably beneficial treatment is in fact available at a hospital or RTC. The statute, while not explicit, seems to contemplate that the interdisciplinary committee would make such a determination.

In *Parham,* the Supreme Court held that the admission of minors to state mental health facilities by their parents was constitutional so long as an "inquiry [was] made by a 'neutral factfinder' to determine whether the statutory requirements for admission [were] satisfied." 442 U.S. at 606. The court found that a formal or informal hearing was not required, and explicitly endorsed the use of informal, traditional medical investigative techniques. 442 U.S. at 607. However, we do not view *Parham* as controlling. The Court in *Parham* was concerned with the commitment of minor children, and its conclusions flow more or less naturally from the unique and traditional relationship shared between parent and child. 442 U.S. at 602-03; *Clark* v. *Cohen,* 613 F. Supp. at 699. "Once someone becomes an adult, one's parents lose that degree of authority found so crucial *in Parham.*" *Clark,* 613 F. Supp. at 699. Moreover, the interest of the parents in avoiding "significant intrusion into the parent-child relationship." at noted in *Parham,* 442 U.S. at 610, is simply not as great in the case of an adult.

We recognize that the decision to commit a person because of mental retardation is, to a large degree, medical in nature. As noted on *Parham,* "neither judges nor administrative hearing officers are better qualified than psychiatrists to render psychiatric judgments." 442 U.S. at 607. However, "[t]he medical nature of the inquiry . . . does not justify dispensing with due process requirements. It is precisely the subtleties and nuances of psychiatric diagnoses that justify the requirement of adversary hearings." *Vitek* v. *Jones,* 445 U.S. at 495. Although dispensing with an adversary proceeding may be justified in the case of a child, we cannot conclude that adults stand in the same position.

However, we also cannot agree with the conclusion of the district court that, because *Parham* is not controlling, due process requires that adults who are involuntarily committed are entitled to a *judicial* hearing. Although, as a matter of policy, precommitment review by a judicial officer would ensure the most vigorous protection of the mentally retarded, and thus, might be preferable, it has been noted in a variety of situations that due process does not require that the neutral trier of fact be legally trained or a judicial or administrative officer. *Parham,* 442 U.S. at 607; *Morrissey* v. *Brewer,* 408 U.S. 471, 489 (1972) (parole revocation hearing); *Goldberg* v. *Kelly,* 397 U.S. 254, 271 (1970) (hearing prior to termination of AFDC benefits).

In identifying those procedures which are required to ensure due process, we are guided by the Supreme Court's opinion in *Vitek* v. *Jones,* 445 U.S. 480 (1980). In *Vitek,* a convicted felon was transferred from a state prison to a mental facility under a state statute which allowed the Director of Correctional Services to effectuate such a transfer upon a finding by a designated physician or psychiatrist that a prisoner "suffers from a mental disease or defect" and "cannot be given proper treatment" in the prison itself. 445 U.S. at 483-4. In affirming the district court's holding that the statute, as applied to the prisoner, deprived him of due process, the Supreme Court approved the district court's requirement of the following minimum procedures:

1. Written notice to the prisoner that a transfer to a mental hospital is being considered;
2. A hearing, sufficiently after the notice to permit the prisoner to prepare, at which disclosure to the prisoner is made of the evidence being relied upon for the transfer and at which an opportunity to be

heard in person and to present documentary evidence is given;

3. An opportunity at the hearing to present testimony of witnesses by the defense and to confront and cross-examine witnesses called by the State;
4. An independent decisionmaker;[6]
5. A written statement by the factfinder as to the evidence relied on and the reasons for transferring the inmate;
6. Qualified and independent assistance must be provided to the inmate.

445 U.S. at 494-5.

Without question, due process requires that mentally retarded adults in Kentucky receive, at a minimum, the procedural safeguards listed above. If these basic safeguards are required before an inmate is transferred from a prison to a mental hospital, surely a person thought to be mentally retarded must be afforded at least the same level of protection before being removed from an ostensibly unfettered existence in society to the confines of an institution. *See Morris, The Supreme Court Examines Civil Commitment Issues: A Retrospective and Prospective Assessment,* 60 Tul. L. Rev. 927, 942 (1986).

Under the current statutory procedure for the involuntary commitment of adults in Kentucky, however, there is no formal mechanism for providing notice, and no method of assuring that the adequacy of notice is related to the time which the potential admittee would require to prepare for the hearing. There is no procedure whereby the admittee may present witnesses or documentary evidence, nor is

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[6] Moreover, the independent decisionmaker must have the authority to implement its decision. *See Parham,* 442 U.S. at 607; *Clark* v. *Cohen,* 794 F. 2d at 86.

there a clear opportunity for cross-examination. No independent assistance is allowed by the statute.[7] Moreover the parent or guardian of the person to be committed is allowed to be a member of the interdisciplinary team, which poses a serious threat to impartiality. Ken. Rev. Stat. Ann. § 202B. 010(1) (1986). Therefore, although we do not conclude that a judicial hearing is required, we agree with the district court's conclusion that the current procedure does not conform with due process.

III.

The Equal Protection Clause of the Fourteenth Amendment requires "that all persons similarly situated should be treated alike." *Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 439 (1985). If a state enacts legislation which treats different classes of people differently, the classification drawn by the statute must be rationally related to a legitimate state purpose, 473 U.S. at 440. The district court held that the denial of a judicial hearing deprived appellees of equal protection under the laws. We agree.

The Commonwealth has not demonstrated that it has any rational basis for distinguishing between the mentally ill and the mentally retarded with regard to a judicial determination of their eligibility for civil commitment. We recognize that, as a matter of fact, there are differences between the mentally ill and the mentally retarded. *See Kremens v. Bartley,* 431 U.S. 119, 135-36 (1977). However, the mere identification of differences is not enough; equal protection "require[s] that a distinction made have some relevance to the purpose for which the classification is made." *Baxstrom* v. *Herold,* 383 U.S. 107, 111 (1966).

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[7] The statute anticipates that the parent or guardian would participate in the process; however, such assistance could hardly be deemed to be independent. *See Lessard* v. *Schmidt,* 349 F. Supp. 1078, 1098-99 (E.D. Wis. 1972), *vacated and remanded for a more specific order,* 414 U.S. 743, *order on remand,* 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated and remanded on other grounds,* 421 U.S. 957 (1975), *order reinstated on remand,* 413 F. Supp. 1318 (E.D. Wis. 1976).

The Commonwealth identifies two interests which it argues are served by the distinction it draws between the mentally ill and the mentally retarded: (1) an interest in not imposing unnecessary procedural obstacles which might prohibit legal guardians from seeking available services for their mentally retarded wards; and (2) its interest in prioritizing diagnostic and service resources to the mentally retarded as soon as possible instead of expending resources in time-consuming procedures prior to admission. However, surely these interests apply to the mentally *ill* as well; the Commonwealth cannot show that the *distinction* which is drawn is rationally related to its stated purposes. *Baxstrom,* 383 U.S. at 111-12; *see Jackson v. Indiana,* 406 U.S. 715, 724 (1972). Therefore, we agreed with the district court that equal protection requires the Commonwealth to provide a judicial hearing to appellees, either upon admission, or, if now committed, when they reach adulthood.

IV.

Appellants further argue that the district court erred in holding that periodic judicial review over the course of commitment was required by equal protection. Appellees, in response, interpret the opinion below as holding that the requirements of equal protection *and* due process mandated periodic judicial review. However, one could conclude from a fair reading of the Memorandum Opinion that the district court did not in fact rule on this issue. After a discussion of the difference between the prospects of recovery for the mentally ill and the mentally retarded, and after noting that "this fundamental difference seems to indicate that the state could prescribe different modes of due process for the review of the commitment of severely and profoundly mentally retarded adults versus the review of the commitment of mentally ill adults," Memorandum III at 8-9, it goes on to conclude:

> However, it is not our duty to spell out at this juncture what such due process procedures might be, and we have not yet been cited to any statute or decision which the parties contend controls the review rights of the mentally retarded adults.
>
> Our only function at this time is to hold that there must be some judicial review, at some appropriate time, of the commitment of persons who are eighteen years or older and who are mentally retarded. Suffice to say that the statute, as it now stands, is unconstitutional with respect to the right to a judicial hearing of menally retarded adults prior to their involuntary commitment. *Clark v. Cohen,* 613 F. Supp. 684 (M.D. Pa. 1985).

Memorandum III at 9.

A fair reading of this section of the opinion would seem to indicate that the phrase "judicial review" in the above quote refers to the district court's conclusion that due process and equal protection, require that, at *some* point, a judicial determination must be made. It is not at all clear that the district court held that due process or equal protection required *periodic* judicial review; indeed, given the fact that the district court recognized that legitimate and relevant factors distinguished the mentally ill and the mentally retarded concerning the efficacy of treatment once they were committed, it at least seems unlikely that appellant's interpretation is correct. However, because both parties have concluded, through their respective interpretations, that there was a holding on this issue, and because both interpretations are at least conceivable from a reading of the Memorandum Opinion, we shall discuss whether due process or equal protection requires periodic judicial review.[8]

A.

Our discussion of judicial hearings at admission as a requirement of due process, Section IIB, *supra,* is applicable to our analysis here. If one has no due process right to a judicial hearing before one is initially committed, logic dictates that no such right exists during the period of confinement. Of course, because involuntary confinement cannot continue after the basis for that confinement ceases to exist, due process requires that *some* periodic review take place during confinement. *See O'Connor v. Donaldson,* 422 U.S. 563, 574-75 (1975). However, as in the case of the initial admission, we cannot say that due process requires a periodic *judicial* review.

B.

As the district court noted, for purposes of equal protection analysis of the requirement for periodic review, "it is recognized that mentally ill persons may recover from their mental illnesses within relatively short periods after their . . . commitment, whereas severely and profoundly mentally retarded persons very rarely experience such dramatic improvements in their condition." Memorandum at 8-9. Thus, there may be constitutionally valid reasons for providing different methods of periodic review for the mentally retarded and the mentally ill. However, we see no legitimate interest of the Commonwealth which would justify denying the mentally retarded periodic judicial

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[8] Also, there is little point in reserving the issue for another day, as it is a virtual certainty that this court shall be required to address it at some juncture.

review while providing the same to the mentally ill. Therefore, the Commonwealth must make a judicial review procedure available to the mentally retarded.[9]

V.

Therefore, for the foregoing reasons, we REVERSE the judgment of the district court inasmuch as it mandates a judicial hearing prior to commitment and periodic judicial review as requirements of due process, and REMAND this issue to the district court to allow it an opportunity to revise the grant of partial summary judgment in a manner consistent with this opinion. In all other respects, the judgment below is AFFIRMED.

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[9] The task of resolving how that procedure may differ from that provided to the mentally ill is one best left to the district court, as it will have the benefit of plans submitted by the parties, and can make findings of fact concerning the relative prognoses of the mentally retarded and the mentally ill.

DEPOSITION OF SANDRA MLINARCIK

Direct Examination by Ms. Miller:

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Mlinarcik--Direct

Q Okay. Do you recall generally the results of your survey?

A I can only speak to the day that I was there. The day that I worked at Hazelwood my team, which was composed of four individuals, one of whom is a staff person at Central State, one of whom was a unit leader at Hazelwood, myself and Ann Oliver, who's the area coordinator for DMR, that was the team I served on. We did 58 assessments.

Q Do you know —

A (Continuing) And of the 58 I think my team had a total of nine individuals who were not recommended for AIS/MR or group home.

Q Nine that were not recommended?

A Right. Nine that were recommended as ICF/MR being the most appropriate least restrictive placement.

Q So of the 58, 49 would be appropriate for placement?

A That's to the best of my recollection. I don't have anything in writing to check on that. That was just at the end of the day we took a count. That was, I believe, the number.

* * * * * * *

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Cross-examination by Mr. Moore:

* * * * * * *

Q Okay. So that the AIS/MR program that we operate, that Kentucky operates, is one that —

A (Interrupting) We designed in compliance with broad general—broad federal guidelines. The copies of waivers that I have boxes here from other states, there's no comparison from state to state.

Q As I understand your testimony, the services that you provide through your AIS/MR program here are designed to provide the same level of care as an individual would receive in a facility such as Hazelwood ICF/MR?

A Right.

Q Okay.

A People need to need the same level of care. So, for instance, when we take an application on an individual to serve them in our AIS/MR program, they have to need the same level of care as they would to get into an ICF/MR. So if somebody came into our program who was not

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mentally retarded and was requesting to be served in the waiver and that person's primary diagnosis was a mental health diagnosis, we wouldn't serve them, because the facilities wouldn't accept them, either. The person needs to qualify for the same level of care that they would receive in an ICF/MR to be eligible for this program.

Q Can you describe for us exactly what that need is for that level of care? In addition to being mentally retarded, I assume that there have to be some health problems or some other basic care needs?

A Right. A person would probably be in need of 24-hour supervision. A person would probably have to have support, at least a structure for guidance and oversight of all of their daily living skills and their needs. They would have to have their time structured throughout the day. They would need to be shown to benefit from active treatment. And that is determined by a tool—it's very similar to the one used, well, like for a facility application. In fact, many of the people who participate in our program have had facility applications done on them, and Division of Institutional Care has said 'yes, this person is appropriate for facility placement'. We're serving many of those people in our program as an alternative.

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Q Let me ask you—I understand that is. Let me ask you if it would be proper to make an analogy between the arrangements you've described that you developed for this other gentleman and that which you would anticipate developing for Tracy, much like that of having a constant companion or big brother for the retarded person to—a benevolent big brother or overseer to try and do what that person wanted?

A No. That isn't accurate. It's a clinical staff treatment program. It's not a big brother service. I think a clear explanation in terms of individualization and attention given to an individual's needs would be based on some of my recent experiences in the facilities. When I was at Hazelwood for these assessments, everybody in a given unit was wrapped in a sheet and laid on a mat on the floor from ten to eleven-thirty every day to rest. I find it hard to believe that all of the individuals in that room all really physically needed a rest at that time. In an adult habilitation program a person would rest during the day when they individually had a physical need to rest and we were able to detect that. So to me that is less restrictive than programming for numbers of

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people in a given unit rather than for an individual.

Q Okay. You mentioned that there's a day treatment program that's provided to mentally retarded people in the AIS/MR program?

A Un-huh.

Q Is that not a structured program?

A It is a structured program with individual programs in it so that not everybody is in the same place at the same time. It is not—it runs from nine to three every day with a home base for the program, but everybody in the program has an individual schedule on a daily basis. The staffing ratio is very high. It's two-to-one staffing ratio which allows a lot of flexibility and individualization.

Q Two staff to one?

A No. Two clients per staff.

Q Okay. In the adult day habilitation program is there no situation where there are two or more clients together at a time?

A There may be periods of time where there might be three or four clients with—in a given area with a staff person.

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Q Okay. Do you have an opinion as to whether or not Hazelwood serves a valid function in the provision of services to the mentally retarded?

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A Hazelwood is currently serving the function of providing institutional care for individuals who live there for whom there are no other options available. I do not think it is serving—it is not the model choice for any individuals with mental retardation or developmental disability.

Q Okay. The institutional model would not be the model of choice?

A Un-huh.

Q The model of choice by whom?

A You asked for my opinion.

Q Okay. That's not your opinion as to the—

A (Interrupting) That's my opinion.

Q Okay. You'd prefer community placement for all mentally retarded individuals?

A If the community were able to provide the level of care to meet the needs of the individual.

Q Okay. Did I correctly understand from your testimony that given the proper level of funding, that Seven Counties or your program could provide for virtually anyone that's currently in the institution?

A Yes.

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Redirect Examination by Ms. Miller:

Ms. Miller: I've got just a few real quick questions, and I'll get you out. Mr. Moore asked you several questions about whether or not you thought Hazelwood as an institution was more restrictive. When you talk about restrictive in determining whether a placement is least restrictive, does it go beyond the four walls and the number of beds, or would it be accurate to say it also includes the type of programs and care that the facility offered?

Ms. Mlinarcik: Could you say that again?

Q It's a long question. Okay. I'm trying to get this all in at once. Okay. Just talking about whether or not Hazelwood is a restrictive placement for an individual. In determining what's restrictive about it, what do you consider?

A I think I almost have to use another word there, Kelly, and that is congregate, that when the larger numbers

of people are congregated, service provision is determined not only by the needs of the individual but also for efficiency and feasibility. They can't serve 220 different dinners. They can't have people going to bed at 17 different times. I think out of necessity congregate settings have to provide services in a more restrictive manner, restrictive in terms of individualization, frequency and

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intensity.

Q Okay.

A Now, to be—in the community I think we also have some restrictions. Right now our biggest one is financial. We didn't have $149 a day per person like the facilities do. We have forty.

Q Okay. Let me ask you this. You testified about a recent observation of seeing residents at Hazelwood being wrapped up in sheets and laid on the floor. Is that one of the concerns that you talk about in treating individuals in a congregate manner?

A I believe that having a rest time five days a week from ten to eleven-thirty for perhaps the ten individuals that were covered with sheets and laying on the mats was more in—more to serve the schedule and the staffing needs than it was for the individual needs of those persons.

Q Okay.

A I think taking an hour and a half nap in the middle of the morning is not age appropriate for adults.

Q And talking about AIS/MR placements, in your professional opinion are those less restrictive than an institutional setting?

A Yes.

[90 RS BR 1782/EN
HB 511]

AN ACT relating to civil commitment.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

Section 1. KRS 202B.010 is amended to read as follows:

As used in this chapter, unless the context otherwise requires:

(1) "Authorized staff physician" means a person who is employed as a physician of an ICF/MR;

(2) "Interdisciplinary team" means the group of persons responsible for the diagnosis, evaluation and individualized program planning and service implementation for the resident. The team is composed of a physician, a psychologist, a registered nurse, a social worker and other professionals, at least one (1) of whom is a qualified mental retardation [~~health~~] professional, and may include the resident, the resident's family, or the guardian;

(3) "Cabinet" means the Kentucky Cabinet for Human Resources;

(4) "Danger" or "threat of danger to self, family or others" means substantial physical harm or threat of substantial physical harm upon self, family or others, including actions which deprive self, family or others of the basic means of survival including provision for reasonable shelter, food or clothing.

(5) "Forensic psychiatric facility" means a mental institution or facility, or part thereof, designated by the secretary for the purpose and function of providing inpatient evaluation, care and treatment for mentally ill or mentally retarded persons who have been charged with or convicted of a felony;

(6) "Hospital" means;

(a) A state mental hospital or institution or other licensed public or private hospital, institution, health care facility, or part thereof, approved by the Kentucky Cabinet for Human Resources as equipped to provide full-time residential care and treatment for mentally ill or mentally retarded persons;

(b) A hospital, institution or health care facility of the government of the United States equipped to provide residential care and treatment for mentally ill or mentally retarded persons;

(7) "Judge" means any judge or justice of the Court of Justice or a trial commissioner of the District Court acting under authority of SCR 5.030;

(8) "Least restrictive alternative mode of treatment" means that treatment given in the least confining setting which will provide a mentally retarded person appropriate treatment or care consistent with accepted professional practice. For purposes of this section, least restrictive alternative mode of treatment may include an institutional placement;

(9) [~~(2)~~] "Mentally retarded person" means a person with significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period;

(10) "ICF/MR [~~(3) "Mental retardation residential treatment center~~]" means *an intermediate care* [~~a residential treatment~~] facility approved by the *cabinet* [~~department~~] for the evaluation, care and treatment of mentally retarded persons;

(11) "Petitioner" means a person who institutes a proceeding under this chapter;

(12) [~~(4)~~] "Qualified mental retardation professional" means:

(a) *A physician licensed under the laws of Kentucky to practice medicine of osteopathy, or a medical officer of the government of the United States while engaged in the performance of official duties;*

(b) A psychologist licensed at the doctoral level or a psychologist or psychological associate certified at the master's level under the provisions of KRS Chapter 319 who has been designated by the Kentucky Board of Examiners of Psychologists as competent to make examinations under this chapter;

(c) A licensed registered nurse with a master's degree in psychiatric nursing from an accredited institution and two (2) years of clinical experience of which one (1) year is with mentally retarded persons; or a licensed registered nurse, with a bachelor's degree in nursing from an accredited institution, who has three (3) years of inpatient or outpatient clinical experience of which one (1) year is in the field of mental retardation and is currently employed by an ICF/MR licensed by the cabinet, a hospital, a regional community mental health and mental retardation program or a private agency or company engaged in the provision of mental retardation services; and

(d) A certified social worker licensed for the independent practice of clinical social work under the provisions of KRS Chapter 335, or a certified social worker under the provisions of KRS Chapter 335 with two (2) years of inpatient of outpatient clinical experience in social work of which one (1) year shall be in the field of mental retardation and is currently employed by an ICF/MR licensed by the cabinet, a hospital, a regional community mental health and mental retardation program or a private agency or company engaged in the provision of mental retardation services [~~psychologist licensed under the provisions of KRS Chapter 319 who has either one (1) year of specialized training for work with mentally retarded persons or one (1) year of clinical experience with mentally retarded persons;~~

~~(b) A licensed registered nurse with a master's degree in psychiatric nursing from an accredited institution with two (2) years of clinical experience. At least one (1) year of such experience shall be with mentally retarded persons or he shall have one (1) year of specialized training for work with mentally retarded persons;~~

~~(c) A certified social worker licensed under the provisions of KRS Chapter 335 or accredited by the academy of certified social workers with two (2) years of clinical experience. At least one (1) year of such experience shall be with mentally retarded persons or he shall have one (1) year of specialized training for work with mentally retarded persons;~~

~~(d) A psychologist or a psychological associated with a master's degree from an accredited institution who has been awarded a certificate of qualification by the Kentucky board of examiners of psychologists under the provisions of KRS Chapter 319 with two (2) years of clinical experience. At least one (1) year of such experience shall be with mentally retarded persons or he shall have one (1) year of specialized training for work with mentally retarded persons; and~~

~~(e) Other professional persons with similar training and experience who are qualified according to regulations promulgated by the secretary to participate in seventy-two (72) hour involuntary hospitalization procedures under this chapter~~];

(13) "Residence" means legal residence as determined by applicable principles governing conflicts of law;

(14) [~~(5)~~] "Resident" means a person under care or treatment in *an ICF/MR* [~~a mental retardation residential treatment center~~] pursuant to the provisions of this chapter; [~~and~~]

(15) "Respondent" means a person alleged in a hear-

ing under this chapter to be a mentally retarded person; and

(16) "Secretary" shall mean the secretary of the Cabinet for Human Resources.

[~~(6) All terms defined in KRS Chapter 202A shall have the same meaning when used in this chapter.~~]

SECTION 2. A NEW SECTION OF KRS CHAPTER 202B IS CREATED TO READ AS FOLLOWS:

All proceedings for the involuntary admission of mentally retarded persons shall be initiated in the District Court of the county where the person to be treated resides or in which the person may be at the time of the filing of a petition.

SECTION 3. A NEW SECTION OF KRS CHAPTER 202B IS CREATED TO READ AS FOLLOWS:

In all proceedings under this chapter, it shall be the duty of the county attorney to assist the petitioner and represent the interest of the Commonwealth and to assist the court in its inquiry by the presentation of evidence.

SECTION 4. A NEW SECTION OF KRS CHAPTER 202B IS CREATED TO READ AS FOLLOWS:

(1) Mentally retarded minors and adult persons may be voluntarily admitted for care and treatment in an ICF/MR under the applicable provisions of this section.

(2) Upon the recommendation or approval of the interdisciplinary team of an ICF/MR, a physician may admit for care and treatment a mentally retarded minor upon application of a parent or guardian. Upon recommendation or approval of the interdisciplinary team of an ICF/MR, the physician may also admit a mildly or moderately mentally retarded adult person who applies voluntarily therefor and who, in the opinion of the physician, possesses the mental capacity to give informed consent for admission.

(3) Upon recommendation or approval of the interdisciplinary team of an ICF/MR, the physician shall discharge any voluntarily admitted resident whose care and treatment in the ICF/MR is determined to be no longer necessary or advisable.

SECTION 5. A NEW SECTION OF KRS CHAPTER 202B IS CREATED TO READ AS FOLLOWS:

(1) An authorized staff physician may order the admission of any person who is present at, or is presented at, an ICF/MR, within twenty-four (24) hours, excluding weekends and holidays, of the admission under this section, the authorized staff physician ordering the admission of the person shall certify in the record of the individual that in the opinion of the physician, the individual should be involuntarily admitted.

(2) Any person who has been admitted to an ICF/MR under subsection (1) of this section shall be released from the ICF/MR within seventy-two (72) hours, excluding weekends and holidays, unless further detained under the applicable provisions of this chapter.

Section 6. KRS 202B.030 is amended to read as follows:

When mentally retarded individuals are involuntarily hospitalized under this chapter, the cabinet may place them in *an ICF/MR* [~~a mental retardation residential treatment center~~]. No mentally retarded person may be involuntarily placed in a hospital without the consent of the secretary, except when the determination of concurrent mental illness is made under the provisions of KRS Chapter 202A. No mentally retarded person [~~or juvenile~~] may be involuntarily admitted to a hospital or *ICF/MR* [~~mental retardation residential treatment center~~] when the cabinet determines that appropriate programs and space are not available.

Section 7. KRS 202B.040 is amended to read as follows:

When a person who is alleged to be mentally retarded is involuntarily *admitted* [~~committed~~], there shall be a determination that:

(1) *The person* [~~He~~] is a mentally retarded person;

(2) *The person* [~~He~~] presents a danger or a threat of danger to self, *family* or others;

(3) The least restrictive alternative mode of treatment *presently available* requires placement in *an ICF/MR* [~~a hospital or mental retardation residential treatment center~~]; *and*

(4) Treatment that can reasonably benefit the *person* [~~individual~~] is available in *an ICF/MR* [~~the hospital or mental retardation residential treatment center; and~~

~~(5) The application by parents or guardians for placement for their retarded family member or ward in any mental retardation treatment center shall not be considered an involuntary commitment under this section, provided the retarded family member's application has been evaluated by an interdisciplinary team as defined in KRS202B.010 and the subsequent admission fully complies with the provisions of KRS Chapter 202B~~].

Section 8. KRS 202B.045 is amended to read follows:

(1) Admission:

(a) *Residents* [~~Patients~~] shall be admitted only upon approval of *an interdisciplinary team* [~~a physician~~]. The facility shall admit only persons who have a physical or mental condition which requires developmental nursing services and a planned program of active treatment;

(b) The interdisciplinary team shall:

1. Conduct a comprehensive evaluation of the individual, not more than three (3) month before admission, covering physical, emotional, social, and cognitive factors; and

2. Prior to admission define the need for service without regard to availability of those services. The team shall review all available and applicable programs of care, treatment, and training and record its findings;

(c) If admission is not the best plan but the individual must be admitted nevertheless, the facility shall clearly acknowledge that the admission is inappropriate and initiate plans to actively explore alternatives;

(d) Before admission, the resident and a responsible member of his family or *guardian* [~~committee~~] shall be informed in writing of the established policies of the facility and fees, reimbursement, visitation rights during serious illness, visiting hours, type of diets offered and services offered; and

(e) The facility shall provide and maintain a system for identifying each resident's personal property and facilities for safekeeping of his declared valuables. Each resident's clothing and other property shall be reserved for *the resident's* [~~his~~] own use.

(2) Discharge planning. Prior to discharge the facility shall have a postinstitutional plan which identifies the residential setting and support services which would enable the resident to live in a less restrictive alternative to the current setting. Before a resident is released, the facility shall:

(a) Offer counseling to parents or guardians who request the release of a resident concerning the advantages and disadvantages of the release;

(b) Plan for release of the resident, to assure that appropriate services are available in the resident's new environment, including protective supervision and other follow-up services; and

(c) Prepare and place in the resident's record a summary of findings, progress, and plans.

SECTION 9. A NEW SECTION OF KRS CHAPTER 202B IS CREATED TO READ AS FOLLOWS:

(1) Proceedings for involuntary admission of a person to an ICF/MR shall be initiated by the filing of a verified petition in District Court.

(2) The petition and all subsequent court documents shall be entitled: "In the interest of (name of respondent)."

(3) The petition shall be filed by a qualified mental retardation professional, peace officer, county attorney, Commonwealth's attorney, spouse, relative, friend or guardian of the person concerning whom the petition is filed.

(4) The petition shall set forth:

(a) Petitioner's relationship to the respondent;

(b) Respondent's name, residence and current location, if known;

(c) The name and residence of respondent's parents, if living and if known, or respondent's legal guardian, if any and if known;

(d) The name and residence of respondent's husband or wife, if any, and if known;

(e) The name and residence of the person having custody of the respondent, if any, or if no such person is known, the name and residence of a near relative or that such person is unknown; and

(f) Petitioner's belief, including the factual basis therefor, that the respondent is mentally retarded and presents a danger or threat of danger to self, family or others if not admitted to an ICF/MR.

(5) Upon receipt of the petition, the court shall examine the petitioner under oath as to the contents of the petition. If the petitioner is a qualified mental retardation professional, the court may dispense with the examination.

(6) If, after reviewing the allegations contained in the petition and examining the petitioner under oath, it appears to the court that there is probable cause to believe the respondent should be involuntarily admitted, the court shall;

(a) Set a date for a preliminary hearing;

(b) Notify the respondent, the respondent's legal guardian, if any, and if known, and the respondent's spouse, parents, or nearest relative or friend concerning the allegations and contents of the petition and the date and purpose of the preliminary hearing; and the name, address and telephone number of the attorney appointed to represent the respondent; and

(c) Cause the respondent to be examined without unnecessary delay by two (2) qualified mental retardation professionals, at least one (1) of whom is a physician. The qualified mental retardation professionals shall certify their findings within twenty-four (24) hours, excluding weekends and holidays.

(7) (a) If the respondent is presently residing in an ICF/MR under the provisions of this chapter, the court may allow continued further residence therein for the respondent to accomplish the examination ordered by the court.

(b) If the respondent is not currently residing in an ICF/MR under the provisions of this chapter, the court may order the respondent, the respondent's guardian, or any person or entity exercising custodial control of the respondent to submit the respondent to an examination, without unnecessary delay, by two (2) qualified mental retardation professionals, at least one (1) of whom is a physician.

(8) If, upon completion of the preliminary hearing, the court finds there is probable cause to believe the respondent should be involuntarily admitted, the court shall order a final hearing to determine if the respondent should be involuntarily admitted.

(9) If the court finds there is no probable cause, the proceedings against the respondent shall be dismissed, and the respondent shall be released from the ICF/MR.

(10) If, upon completion of the final hearing, the court finds the respondent should be involuntarily admitted, the court shall order the respondent admitted in an ICF/MR for an indeterminate period. The order shall also specify the period within which the initial review pursuant to Section 24 of this Act is to be held.

SECTION 10. A NEW SECTION OF KRS CHAPTER 202B IS CREATED TO READ AS FOLLOWS:

A respondent who has been ordered involuntarily admitted following the preliminary hearing shall have venue for all subsequent proceedings, including the final hearing, transferred to the court of the county where the respondent is admitted; however, the court of the county where the preliminary hearing was held may, upon its own motion, or shall, upon motion of one (1) of the parties, retain venue over proceedings subsequent to the preliminary hearing.

SECTION 11. A NEW SECTION OF KRS CHAPTER 202B IS CREATED TO READ AS FOLLOWS:

(1) The certificate referred to in this chapter shall be in the form prescribed by the cabinet. The certificate shall state that the respondent has been examined by each of the qualified mental retardation professionals making the certificate within twenty-four (24) hours, excluding weekends and holidays, prior to the date of the certificate. It shall state the facts and circumstances upon which the judgment of the examining physician is based and shall be sworn to before a notary or the clerk or judge of the court.

(2) The examiner shall be entitled to a fee for the examination and certification, to be paid by the county in which the petition is filed, upon a certified copy of an order of allowance made by the court holding the hearing.

SECTION 12. A NEW SECTION OF KRS CHAPTER 202B IS CREATED TO READ AS FOLLOWS:

If any proceeding for involuntary admission under the applicable provisions of this chapter, if the criteria for involuntary admission are not certified by at least two (2) examining qualified mental retardation professionals, at least one (1) of whom is a physician, the court shall, without taking any further action, terminate the proceedings and order the release of the person. The qualified mental retardation professionals shall certify to the court, within twenty-four (24) hours of the examination, excluding weekends and holidays, their findings and opinions as to whether the person shall be involuntarily admitted.

SECTION 13. A NEW SECTION OF KRS CHAPTER 202B IS CREATED TO READ AS FOLLOWS:

A qualified mental retardation professional retained by the respondent, or the respondent's parent or guardian, at the expense of the parent or guardian, shall be permitted to witness and participate in any examination of the respondent and may submit findings, if any, to the court.

SECTION 14. A NEW SECTION OF KRS CHAPTER 202B IS CREATED TO READ AS FOLLOWS:

(1) The preliminary hearing shall be held not later than fifteen (15) days, excluding weekends and holidays from the date of the filing of the petition.

(2) The final hearing shall be held within twenty (20) days of the date of the preliminary hearing or within thirty (30) days of the date of filing of the petition if the preliminary hearing is waived.

SECTION 15. A NEW SECTION OF KRS CHAPTER 202B IS CREATED TO READ AS FOLLOWS:

(1) The preliminary hearing need not be formal and shall include the receiving of the qualified mental retardation professionals' reports as evidence. The hearing may be

held by the court in chambers, at an ICF/MR, or other suitable place. The respondent shall be afforded an opportunity to testify, to present witnesses, and to cross-examine any witnesses. The respondent and the attorney for the respondent may waive respondent's right to a preliminary hearing.

(2) The final hearing may be conducted in an informal manner, consistent with orderly procedures, and in a physical setting not likely to have a harmful effect on the mental or physical health of the respondent. The hearing may be held by the court in chambers, at an ICF/MR, or other suitable place. The respondent shall be afforded an opportunity to testify, to present, and cross-examine any witnesses. The manner of proceeding and the rules of evidence shall be the same as those in any criminal proceeding, except that the standard of proof shall be by clear and convincing evidence. Proceedings shall be heard by a judge unless a party requests a jury trial. Neither the respondent nor the respondent's attorney may waive the respondent's right to a final hearing.

(3) Guardians and immediate family members of the respondent shall be allowed to attend all hearings, conferences or similar proceedings; may be represented by private council, if desired; may participate in the hearings or conferences as if a party to the proceedings; may cross-examine witnesses if desired; and shall have standing to appeal any adverse decision.

SECTION 16. A NEW SECTION OF KRS CHAPTER 202B IS CREATED TO READ AS FOLLOWS:

(1) Following the preliminary hearing but prior to the completion of the final hearing, the court may order the respondent to reside in an ICF/MR approved by the secretary for that purpose for the committing judicial district in a community program approved by the secretary, in a hospital, or in jail for a period not to exceed forty-eight (48) hours if no other alternative exists. The respondent may be released, upon application and agreement of the parties, for the purpose of community-based outpatient treatment.

(2) A physician of an ICF/MR or a hospital shall discharge a respondent residing therein and notify the court and attorneys of record, if the interdisciplinary team of the ICF/MR or an authorized staff physician of the hospital determines that the respondent no longer meets the criteria for involuntary admission.

(3) If a respondent is discharged by the ICF/MR or hospital pursuant to subsection (2) of this section, the proceedings against the respondent shall be dismissed.

SECTION 17. A NEW SECTION OF KRS CHAPTER 202B IS CREATED TO READ AS FOLLOWS:

(1) The court records of respondent made in all proceedings pursuant to KRS Chapter 202B shall be confidential and shall not be open to the general public for inspection except when the disclosure is provided in Section 18 of this Act.

(2) Following the discharge of a respondent from an ICF/MR or hospital or the issuance of a court order denying a petition for admission, a respondent may at any time move to have all court records pertaining to the proceedings expunged from the files of the court. The county attorney shall be given notice of any motion and shall have five (5) days in which to respond to same or request a hearing thereon.

(3) Any person seeking information contained in the court files or the court records of proceedings involving persons under this chapter may file a written motion in the appropriate court setting out why the information is needed. A district judge may issue an order to disclose the information sought if the judge finds the order is appropriate under the circumstances and if the judge finds it is in the best

interest of the person or of the public to have the information disclosed.

SECTION 18. AN NEW SECTION OF KRS CHAPTER 202B IS CREATED TO READ AS FOLLOWS:

In proceedings under this chapter, there shall be no privilege as to any relevant communications between qualified mental retardation professionals and patients. Qualified mental retardation professionals may disclose communications relating to diagnosis and treatment of the patient's mental condition.

SECTION 19. A NEW SECTION OF KRS CHAPTER 202B IS CREATED TO READ AS FOLLOWS:

(1) The court which orders any person to an ICF/MR under the provisions of this chapter, shall at once notify the cabinet that the order has been made, advising of the sex and condition of the person.

(2) The ICF/MR may refuse to receive any person who has been ordered to be involuntarily admitted by a court order if appropriate programs and space are not available or the papers presented with the person at the ICF/MR do not comply with the provisions of this chapter or if it does not receive notification of the order or involuntary admission as required by this chapter.

(3) After the cabinet has been so notified, the court may order the sheriff of the county to transport the person within forty-eight (48) hours, excluding weekends and holidays, from the county in which the person is located to the ICF/MR designed by the cabinet. The actual traveling expenses of persons transporting the person to the institution shall be paid by the cabinet. Each female admitted to an ICF/MR shall be accompanied by a female attendant, unless accompanied by her mother, father, sister, brother, husband, daughter or son.

(4) In returning any person to the county from which that person is sent, the cost of returning the person shall be paid in the same manner when necessary.

(5) If a person is involuntarily admitted by a court order, the person shall be transported to the ICF/MR designated by the cabinet and accompanied by the following documents:

(a) A copy of the petition for involuntary admission;

(b) The certificate of qualified mental retardation professionals; and

(c) The order of involuntary admission.

SECTION 20. A NEW SECTION OF KRS CHAPTER 202B IS CREATED TO READ AS FOLLOWS:

Upon the filing of a petition for involuntary admission pursuant to Section 8 of this Act, the court shall appoint an attorney to represent the respondent with the appointment and representation to continue unless the respondent retains private counsel. The appointed attorney shall be forthwith notified by the clerk of the allegations in the petition and the date and purpose of the preliminary hearing. When it is necessary to appoint counsel, the District Court shall endeavor to appoint private counsel, if available, to represent respondents, from a list of attorneys who have volunteered to represent such respondents. The list shall be maintained by the district court clerk. Private counsel appointed by the court shall be compensated in the manner set forth in KRS 620.100 (1)(a). If no other method of appointing counsel for the respondent is available, the respondent shall be represented by the public advocate pursuant to KRS Chapter 31.

SECTION 21. A NEW SECTION OF KRS CHAPTER 202B IS CREATED TO READ AS FOLLOWS:

The respondent shall be present at all hearings unless the respondent and the respondent's attorney waive the respondent's rights to be present, or unless the court makes *a specific finding after the respondent has been brought to the place of the hearing that the respondent should be removed from the hearing because the person's conduct is so disruptive that the proceedings cannot continue in any reasonable manner.*

SECTION 22. A NEW SECTION OF KRS CHAPTER 202B IS CREATED TO READ AS FOLLOWS:

Appeals from the final orders or judgments of the District Court made and entered in proceedings under this chapter shall be taken in the manner as other appeals from District Court to Circuit Court. Appeals may be taken by the Commonwealth, the individual who is subject to the proceedings or the individual's guardian, limited guardian, or other authorized representative. This appeal shall be advanced on the Circuit Court docket without motion or notice.

SECTION 23. A NEW SECTION OF KRS CHAPTER 202B IS CREATED TO READ AS FOLLOWS:

(1) Every resident admitted under the provisions of this chapter shall have an annual review conducted by an interdisciplinary team of the ICF/MR to determine the appropriateness of and the necessity for care and treatment provided the resident in the ICF/MR. On or before the anniversary date of an involuntary admission order entered for a resident pursuant to Section 18 of this Act, and every year thereafter for as long as the resident resides in the ICF/MR, the ICF/MR shall file with the admitting court an interdisciplinary evaluation report on behalf of the resident whose continued placement in the ICF/MR is required. The report shall detail the social, psychological, medical, and other considerations requiring continued placement of the resident in the ICF/MR, a description of the treatment or rehabilitation programs which will benefit the resident as a result of such placement, and a statement that the criteria for involuntary admission set forth in KRS 202B.040 are satisfied. The interdisciplinary report shall list the name and address of the guardian or limited guardian or, if none, an immediate family member of the resident.

(2) The physician shall discharge a resident whose admission is pursuant to court order when it is determined by the interdisciplinary team that the resident no longer meets the criteria for involuntary admission as provided in KRS 202B.040. When a resident is discharged, the ICF/MR shall send notice of the discharge to the court.

SECTION 24. A NEW SECTION OF KRS CHAPTER 202B IS CREATED TO READ AS FOLLOWS:

(1) No less than once in every five (5) years following the initial order for involuntary admission of a resident to an ICF/MR, or an order authorizing continued care and treatment following review pursuant to this section, the court shall hold a hearing to review the status of the resident and necessity for continued care and treatment in the ICF/MR. Notice at least twenty (20) days in advance of the hearing shall be provided by the court to the ICF/MR, county attorney, guardian or limited guardian of the resident, if any, or, if none, an immediate family member as listed on the last interdisciplinary report filed by the ICF/MR. The court shall appoint an attorney to represent the resident at the review hearing.

(2) The review hearing may be informal and held in open court, in chambers, or at the ICF/MR. The hearing shall be held without a jury and the resident shall be entitled to present documentary evidence and witnesses and cross-examine witnesses against the resident.

(3) At the conclusion of the review hearing, the court shall make written findings of fact concerning whether the criteria for involuntary admission set forth in KRS 202B.040 continue to be satisfied based upon clear and convincing evidence. If the court finds that the involuntary admission

criteria continue to be satisfied, the court shall enter an order authorizing the continued care and treatment of the resident at the ICF/MR and shall establish the period within which the next review shall be held. Otherwise, the court shall enter an order requiring the resident to be discharged from the ICF/MR.

(4) If at any point during the resident's placement at an ICF/MR it appears that the resident no longer meets the criteria for involuntary admission set forth in KRS 202B.040, the resident, the resident's parent, guardian or limited guardian, immediate family member or attorney may request a review pursuant to this section.

SECTION 25. A NEW SECTION OF KRS CHAPTER 202B IS CREATED TO READ AS FOLLOWS:

At any time, and without notice, a person detained at a facility, or a relative, friend, guardian, representative, or attorney on behalf of such person, may petition for a writ of habeas corpus to question the cause and legality of the detention and request that the Circuit Court issue a writ for release.

SECTION 26. A NEW SECTION OF KRS CHAPTER 202B IS CREATED TO READ AS FOLLOWS:

(1) A physician may release a resident on convalescent leave status when the interdisciplinary team concludes that the resident would not present a danger or a threat of danger to self, family or others if provided with continued medical supervision in a less restrictive alternative mode of treatment. Release on convalescent leave status does not terminate a court admission order and shall include provisions for the development of a treatment pan jointly by the ICF/MR and by a provider of outpatient care for follow-up care by the provider and for the continual monitoring of that resident's condition by the provider.

(2) The ICF/MR from which the resident is given convalescent leave status may at any time readmit the resident without additional court proceedings. If there is reason to believe that is in the best interest of the resident to be readmitted, the secretary or an authorized staff physician of the ICF/MR may issue an order for the immediate readmission of the resident. The order, if not voluntarily complied with, shall, upon the endorsement by a judge of any court of the county in which the resident resides or is present, authorize any peace officer to take the resident into custody and transport the person to the responsible ICF/MR. Notice of readmission under this section shall be given to the originating court as soon as practicable and simultaneously with the order directing the readmission if possible.

(3) Release on convalescent leave status shall not apply to persons held under admission orders arising out of KRS Chapter 504 unless consent of the appropriate court is obtained.

SECTION 27 A NEW SECTION OF KRS CHAPTER 202B IS CREATED TO READ AS FOLLOWS:

If a resident undergoing involuntary treatment on an inpatient basis is absent from the ICF/MR without or in excess of authorization from the ICF/MR staff, the person in charge or that person's designee may notify the appropriate sheriff or other peace officers who shall take the resident into custody and return the resident to the ICF/MR.

SECTION 28. A NEW SECTION OF KRS CHAPTER 202B IS CREATED TO READ AS FOLLOWS:

Upon recommendation or approval of the interdisciplinary team of an ICF/MR, a physician may admit for respite care a mentally retarded person. Respite care provided to any mentally retarded person under this section shall not exceed a total of thirty (30) days in any calendar year.

Section 29. KRS 202B.060 is amended to read as follows:

The secretary shall adopt administrative regulations for the proper administration and enforcement of this chapter. *The* [~~Such rules and~~] regulations shall include, but shall not be limited to:

(1) Rights of mentally retarded residents and their families to be adequately informed as to the individual treatment program of the resident;

(2) Rights of residents and their families to assist in the planning of the treatment program of the resident;

(3) Rights of residents and their families under certain conditions to refuse treatment offered to the resident by the hospital or *ICF/MR* [~~mental retardation residential treatment center~~];

(4) Rights of residents to maintain, keep and use personal possessions and money;

(5) Rights of residents to meet with friends and relatives;

(6) Rights of residents to receive payment for work performed on behalf of the hospital or *ICF/MR* [~~mental retardation residential treatment center~~];

(7) Rights of residents to refuse intrusive treatments, including electroshock or psychosurgery;

(8) Rights of residents to seek relief from participating in their treatment plans;

(9) Rights of residents who are minors to seek relief from actions, approved by their parents or guardians, for or against admission and discharge;

(10) The use of seclusion and other mechanical restraints in hospitals and *ICF/MR's* [~~mental retardation residential treatment centers~~];

(11) The release of residents to less restrictive alternative modes of treatment on convalescent status; and

(12) Provisions for alternative methods for involuntary *admission* [~~hospitalization~~].

SECTION 30. A NEW SECTION OF KRS CHAPTER 202B IS CREATED TO READ AS FOLLOWS:

(1) Every ICF/MR approved under the provisions of this chapter shall have a review committee of three (3) qualified mental retardation professionals appointed by the facility director. This review committee shall have the authority to review the appropriateness of a resident's individual treatment plan.

(2) Upon the refusal of an involuntary resident to participate in any aspect of the resident's treatment plan, the review committee shall examine the appropriateness of the resident's individual treatment plan. Within three (3) days of the refusal, the review committee shall meet with the resident and the resident's counsel or other representative to discuss their recommendations.

(3) If the resident still refuses to participate in any aspect of the resident's individual treatment plan, the ICF/MR may petition the District Court for a de novo determination of the appropriateness of the proposed treatment. Within seven (7) days, the court shall conduct a hearing, consistent with the resident's rights to due process of law, and shall utilize the following factors in reaching its determination:

(a) Whether the treatment is necessary to protect other residents or the resident himself from harm;

(b) Whether the resident is incapable of giving informed consent to the proposed treatment;

(c) Whether any less restrictive alternative treatment exists; and

(d) Whether the proposed treatment carries any significant risk of permanent side effects.

(4) Upon completion of the hearing, the court shall enter an appropriate judgment. The proposed treatment shall be authorized if supported by clear and convincing evidence. If the court denies the ICF/MR the right to administer the treatment in question, the ICF/MR may discharge the resident, unless an interdisciplinary team of the ICF/MR determines that an alternative treatment is available and acceptable to both the interdisciplinary team and the resident and would benefit the resident.

SECTION 31. A NEW SECTION OF KRS CHAPTER 202B IS CREATED TO READ AS FOLLOWS:

(1) Legal residents of the state who have become public charges in other states and have been returned to Kentucky because they have been involuntarily admitted may be immediately admitted to an ICF/MR at the request of the secretary or the secretary's designated representative.

(2) Within seventy-two (72) hours, excluding weekends and holidays, of the admission date, the staff of the ICF/MR shall determine the need of the person for further admission. If two (2) qualified mental retardation professionals, at least one (1) of whom is a physician, conclude that the person shall be involuntarily admitted, they shall file in the appropriate court a certification requesting involuntary admission procedures be initiated under the provisions of this chapter, unless the person has agreed to remain voluntarily and possesses the mental capacity to give informed consent for voluntary admission.

Section 32. KRS 202B.050 is amended to read as follows:

All rights guaranteed by KRS [~~Chapters 202A (other than those rights enumerated in KRS 202A.026 and 202A.051) and~~] Chapter 210 to mentally ill persons shall apply to mentally retarded persons.

Section 33. KRS 202B.080 is amended to read as follows:

This chapter may be cited as the "Kentucky Mental Retardation Admission [~~Hospitalization~~] Act".

Section 34. KRS 202B.990 is amended to read as follows:

(1) The unwarranted *admission* [~~hospitalization~~] of any *person* [~~individual~~] under the provisions of this chapter; or

(2) The denial of any *person* [~~individual~~] of any of the rights accorded to him under the provisions of this chapter shall be punished by a fine not exceeding five thousand dollars ($5000) or imprisonment for a term not to exceed five (5) years or both.

(3) Any persons who violates the confidentiality of any mental health record under the provisions of this chapter shall be guilty of a Class A misdemeanor.

Section 35. KRS 387.540 is amended to read as follows:

(1) Prior to a hearing on a petition for a determination of partial disability or disability and the appointment of a limited guardian, guardian, limited conservator, or conservator, an interdisciplinary evaluation report shall be filed with the court. The report shall be compiled by at least three (3) individuals, including a physician, a psychologist licensed or certified under the provisions of KRS Chapter 319, and a person licensed or certified as a social worker or an employee of the Cabinet for Human Resources who meets the qualifications of KRS 335.080 (1) (a), (b) and (c) or 335.090 (1) (a), (b) and (c). The social worker shall, whenever possible, be chosen from among employees of the Cabinet for Human Resources residing or working in the area, and there shall be no additional compensation for their service on the interdisciplinary evaluation team.

(2) At least one (1) person participating in the compilation of the report shall have knowledge of the particu-

lar disability which the respondent is alleged to have or knowledge of the skills required of the respondent to care for himself and his estate.

(3) If the respondent is alleged to be partially disabled or disabled due to mental illness, at least one (1) person participating in the compilation of the interdisciplinary evaluation report shall be a qualified mental health professional as defined in KRS 202A.011 (11). If the respondent is alleged to be partially disabled or disabled due to mental retardation, at least one (1) person participating in the compilation of the evaluation report shall be a qualified mental retardation professional as defined in KRS 202B.010 *(12)* [~~(3)~~].

(4) The interdisciplinary evaluation report shall contain:

(a) A description of the nature and extent of the respondent's disabilities, if any;

(b) Current evaluations of the respondent's social, intellectual, physical, and educational condition, adaptive behavior, and social skills. Such evaluations may be based on prior evaluations not more than three (3) months old, except that evaluations of the respondent's intellectual condition may be based on individual intelligence test scores not more than one (1) year old;

(c) An opinion as to whether guardianship or conservatorship is needed, the type of guardianship or conservatiorship needed, if any, and the reasons therefor;

(d) An opinion as to the length of time guardianship or conservatorship will be needed by the respondent, if at all, and the reasons therefor;

(e) If limited guardianship or conservatorship is recommended, a further recommendation as to the scope of the guardianship or conservatorship, specifying particularly the rights to be limited and the corresponding powers

and duties of the limited guardian or limited conservator;

(f) A description of the social, educational, medical, and rehabilitative services currently being utilized by the respondent, if any;

(g) A determination whether alternatives to guardianship or conservatorship are available;

(h) A recommendation as to the most appropriate treatment or rehabilitation plan and living arrangement for the respondent and the reasons therefor;

(i) A listing of all medications the respondent is receiving, the dosage, and a description of the impact of the medication upon the respondent's mental and physical condition and behavior;

(j) An opinion whether attending a hearing on a petition filed under KRS 387.530 would subject the respondent to serious risk of harm;

(k) The names and addresses of all individuals who examined or interviewed the respondent or otherwise participated in the evaluation; and

(l) Any dissenting opinions or other comments by the evaluators.

(5) The evaluation report may be compiled by a community mental health-mental retardation center, a licensed facility for mentally ill or developmentally disabled persons, if the respondent is a resident of such facility, or a similar agency.

(6) In all cases where the respondent is a resident of a licensed facility for mentally ill or developmentally disabled persons and the petition is filed by an employee of that facility, the petition shall be accompanied by an interdisciplinary evaluation report prepared by the facility.

(7) Except as provided in subsection (6) of this section, the court shall order appropriate evaluations to be performed by qualified persons or a qualified agency. The

report shall be prepared and filed with the court and copies mailed to the attorneys for both parties at least ten (10) days prior to the hearing. All items specified in subsection (4) of this section shall be included in the report.

(8) If the person evaluated is a poor person as defined in KRS 453.190, the examiners shall be paid by the county in which the petition is filed upon an order of allowance entered by the court. Payment shall be in an amount which is reasonable as determined by the court, except no payment shall be required of the county for an evaluation performed by a salaried employee of a state agency for an evaluation performed within the course of his employment. Additionally, no payment shall be required of the county for an evaluation performed by a salaried employee of a community mental health-mental retardation center or private facility or agency where the costs incurred by the center, facility, or agency are reimbursable through third-party payors. Affidavits or other competent evidence are admissible to prove the services rendered but not to prove their value.

(9) The respondent may file a response to the evaluation report no later than five (5) days prior to the hearing.

(10) The respondent may secure an independent evaluation. If the respondent is unable to pay for such evaluation, compensation for the independent evaluation may be paid by the county in an amount which is reasonable as determined by the court.

Section 36. The following KRS section is repealed:

202B.020 Hospitalization for mentally retarded—Court examination.

/s/ Donald J. Blanford
Speaker-House of Representatives

/s/ Brereton C. Jones
President of the Senate

Attest: /s/ Evelyn Marston
Chief Clerk of House of Representatives

Approved: /s/ Wallace G. Wilkinson
Governor

Date: 3/22/90

DEPOSITION OF THOMAS HORTON

Direct Examination:

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Q Yes, that's exactly it. Let's talk then for a few minutes about your daughter. Her name is Tracy?

A Teresa Ann. Tracy is a nickname.

Q What's her birthdate?

A April 27th, 1965.

Q And I understand that she is mentally retarded?

A She is mentally retarded. Diagnosed at the age of one.

Q You answered my next question. Do you recall what her highest level of function is in terms of

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IQ or classification of mentally retarded persons?

A She's at her highest level now of IQ. There was a time when she functioned a little better physically but that was when she was quite small and that as she grew larger then her physical abilities just evaporated. When she was a little child she could support her weight, not walking but standing up to a chair. I'm talking about when she was two years old she could stand up to a chair. As she grew larger she couldn't begin to support herself. So her physical capabilities just peaked I would say at the age of two.

Mentally, I guess it's safe to say she—I don't know. I'm not qualified to say. She's never been able to speak, never been able to indicate to us. We don't know what she can see, don't know what she can hear. In my judgment she's at—attained her peak as a child and has remained there.

Q Does she function well enough to be tested?

A No. She has been tested by the Jefferson County School systems when she entered the program out there at Tully's. They evaluated her, but it's a passive process. You know, the psychologist could do the testing. They're qualified and they rated her as on a three months—is that what it was? Three months

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development, mental development and I have to think as much—I have to think they're right. I have never seen any evidence that Tracy was any more than that.

Q How old was Tracy when you and Mrs. Horton first started discussing the fact that you would not be able to continue to care for her at home and would need to seek a place for her care or rehabilitation outside the home?

A Well, I think we were like any naive young parents. We didn't really realize what kind of problem we were dealing with. We knew that Tracy was developing slowly, but by the time she was one year old she showed no signs of walking. So we took her down to UK Medical Center and they diagnosed her as being profoundly retarded and having Cerebral Palsy. We accepted Tracy as a special package of joy that we were going to raise as best we could.

We realized early on that there were no facilities whatever in the city of Ashland for a child like Tracy. They just are nothing. Later on after we left Ashland they opened a CP school, but they had nothing for her. We felt that we were going to have to move to a larger city to find any kind of services for Tracy, so we moved to Louisville in 1970. We went to the old CP facility down on Fourth Street and we visited the

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sheltered workshop out by the State Fairgrounds off Crittenden Drive and we visited the CP school on Newburg

Road and Tracy didn't—she wasn't acceptable for any of those programs. She wasn't—she didn't have the development, you know, to go sheltered workshop. And see, bear in mind, this was before the Federal Government manned the Equal Educational Opportunities for the Disabled.

Q How old was Tracy when you returned to Louisville or moved to Louisville?

A She was born in '65 and we moved to Louisville in 1970, so she was five when we moved here; is that right?

Q Can you describe for us how she was functioning physically and mentally at age five when you went back to Louisville?

A It's not back to Louisville. We're not natives of Louisville. We're natives of Ashland. So we moved here in 1970. Tracy never, as I said, when she was a little child she could stand up to a coffee table. She could pull herself up and stand up to that coffee table. That's as far as she ever got at any—what might be remotely described as ambulation. She, as I recall, we had to carry her everywhere she went, everywhere. She could crawl around the room and if you enticed her she

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might crawl to you but she might just as readily crawl in the opposite direction. She suffered from frequent respiratory problems. Apart from the colds and the pneumonia, you know, she probably was relatively healthy. She had really bad teeth, no gum development whatever. That was a problem that—as a matter of fact shortly after we moved to Louisville we had to take her down and have a gingivectomy done, which hurt us a lot worse than it did her I think. That was an excruciating thing. But Tracy never—she just never developed physically. She grew larger, but she never really developed much physical capacity.

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Q Would you tell us about the program at that school?

A Well, I guess, you know, you're more

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tuned into this than I am. I guess there was a court case and I guess the Federal Government or the Supreme Court ruled that every child in the United States had to be given the opportunity to learn, to go to school and to learn at his level. So anywhere there was an infusion of money into these programs. They opened two wonderful schools here in Louisville, Churchill Park School and Tully School. In the beginning Tracy was in the old J-town High School and then later on they opened the new school out there, but it was—they had full staff our there, a principal administrator. They had physical therapists. They had occupational therapists. They had a dietary program. They had training programs. They had a swimming pool. They have a kitchen out there kind of like a McDonald's where they can take a retarded individual and teach him how to cook maybe. I mean teach him at his level and they had all manner of children out there. Some of the profoundly involved and some that were minimally involved and Tracy was always those most profoundly involved.

So I'm guessing, Sharon is not helping me, but I think in the late '70's is when this program became available and they had a bus. They had buses, lift vans and they came to the house—little yellow vans with—the first one didn't have a lift. We had to lift

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her up into the thing. Later on they had lift buses. So she was in a regular nine month program. The bus came to the house in the morning. Took her to Tully and brought her back in the afternoon Monday through Friday. And she was permitted to stay in this, I think two years beyond normal graduation; is that right, Sharon, age 20, 21?

Mrs. Horton: Twenty-one.

A Age 21. She was permitted to stay in this until age 21 and then she had to leave.

Q During that time would that therapy with the other treatment that was available at the Tully School, did she ever obtain the ability to speak?

A No, She never did speak, but we believe that socially and physically this was probably the peak time of her life, those years at Tully.

Q Why do you say that?

A Well, we noticed that when she was in the Tully program she would come home and they would kind of wear her out. We noticed she slept very well, but also in the summertime when school was not in session, she became much more lethargic, less animated, more drowsy. It seemed that we believed that the social aspects of it, and of course, the exercises that the—all the noises and sounds and the activity and the social aspects was what caused her to be improved and we felt that in the

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summertime, when there was no program here, that she just went down hill. She would drool a lot more. She would sleep more. She would crawl less. Just generally she just would kind of curl up in the floor in the summertime. I don't know, just less animated and more animated in the wintertime while she was in school. Whether we were right or wrong about that, it was conjecture. We think we were right. We could not notice a definite difference in her when school was not in session. I mean she wasn't being stimulated at home the way she was at school.

Q What was it like providing for a mentally retarded adult at home?

A Well, you can imagine it. Tracy has no self-help skills. We had to get her up in the morning, diaper her, wash her up, feed her her breakfast one spoonful at a time, dress her, get her strapped in her wheelchair and wait on the schoolbus. When there was no school, we put her down on the floor or let her sit in her wheelchair and alternate it. She liked to watch T.V. We don't know what she got out of it other than the noise and maybe the color, but she would watch T.V., nap a lot, crawl through the house a little bit and then as she got larger she crawled less and less. Toward the end she wasn't crawling at all, but anyway I'm getting ahead of myself.

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A typical day when she was in session we get her strapped in the wheelchair, get her coat on her and get her out to the bus. On weekends when school was not in session we would get her dressed and let her sit in front of the T.V. and watch T. V. or her mother would just bring her over in the kitchen and just talk to her. But that was kind of a typical day for her. She had to be diapered several times each day. She had to be bathed and she had to be fed three times plus a bedtime snack. She had to be given her medication without fail. She's been on tranquilizers since she was a baby or since she was one year old she's been on tranquilizers.

Q What would her medicine regimen be like?

A She would take a Mellaril, which is a tranquilizer or she took Dolatin for some years. She took Phenobarbital. It would generally be given at meal times, I believe, three times a day or two times a day; isn't that right? She didn't take a pill at bedtime. She took her medicine at meal times. And she's been on that Mellaril for years and years and to my knowledge is still on it today. She's had a lot of skin sensitivities over the years, many, skin problems and I think she inherits those from her Grandfather, my Father, who was killed. My father died prematurely as a direct result of

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skin problems and I inherited those skin problems, not nearly like my Father had. And now Tracy has skin sensitivities and she'll develop rashes and everything in the world. Anyway that's probably under much better control than in my Father's time.

Q How did those skin problems evidence themselves when she was living at home with you?

A Well, she in the moist areas of her body, under her arms, behind her knees, behind her ears she would get a red raw area behind her ears and we had to medicate those with ointment. She had, for years and years and years she had what's called a Cradle Cap, little infants get Cradle Cap. Now Tracy kept it into adulthood and still has it to this day and on occasions a real scaliness and when you scratch it away just reveals raw skin. She's had to have special shampoos administered to her to control her scalp problems. I'm just absolutely convinced she inherited that from my Dad. My Dad had Eczema really bad and it killed him in the days before there was penicillin. And I've been on skin medication since I was a young man. My problems are nothing compared to my Dad's and Tracy's.

Tracy's other big health problem that I can recall is she had an ongoing lung problem, pulmonary problem. She has had very frequent pneumonia and that's

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because for obvious reasons she's always—she never developed her lungs, never developed her muscles, never learned how to do controlled breathing, on her back very, very

frequently or on her stomach. She's in a prone position very frequently. When she's in a wheelchair she's slouched, so her chest is just caved in and she never developed those lungs and I have no idea how many times she had had pneumonia over the years. I would say dozens of cases of pneumonia since her childhood and that seems to go on. It goes with the—it goes with her retardation. It is directly related to it. There's little we can do other than just give her antibiotics.

Q Did you observe any symptoms of Cerebral Palsy other than—

A Yes. As a matter of fact when she was diagnosed—that's her official diagnosis. She has Cerebral Palsy with profound Mental Retardation. Is that right? Yeah, that was—when we had her diagnosed at the UK Medical Center that was the diagnosis, Cerebral Palsy. I heard about Cerebral Palsy, but didn't know what it was and they said it's brain damage. The child was born with brain damage. It comes in all sorts of degrees and your child has it in the worst possible degree.

Q Tell us then how it was that you and Mrs. Horton came to the decision that you could no longer

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care for Tracy at home?

A Well, we felt that the program at Tully was really benefitting her and that that structured activity, that structured physical therapy, the structured occupational therapy she was given and the social setting really helped her development. As I said we noticed that she deteriorated in the summertime.

There came a time when Tracy had to leave Tully because of her age and this coincided with—this coincided with a deterioration in her physical condition. Then that winter, was that the winter of '86? I don't know. We'll get to that in a minute. Tracy turned—her birthday was in April so she would have had to leave school at the end of that school year which was probably in late May, I guess. That winter, that winter she started getting sick again and this was something we experienced many, many times, but it was worse than it had ever been before. She had always, for years and years and years, she had what are called bed sores or decubitus ulcers on the pressure points. She had a couple at the base of her spine just above her buttocks, which I think that's called the coccyx area. She had always had a bed sore there and she had a couple on her hips for as long as we could remember, but they were bigger and uglier and more open and running than we had ever seen before.

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We had been treating them for years in our incompetent way. But this time we just couldn't seem to get them to stop. They just got worse and I had her seen by a doctor and we were given medication to use. At the same time she was getting more and more congested, that deep croupiness that we had experienced before, but it seemed to be worse than it had ever been. Her limbs started swelling. This didn't start that winter. Her limbs had been swelling off and on for years. She often had swollen limbs, but this time it was worse than it had ever been. Her doctors said that she simply had congestive heart failure and it was a part of her condition that her heart wasn't developed and because of all the water in her lungs it was something we were going to have to try and fix and deal with.

So there were a culmination of things that were going on. Her condition was just going downhill fast and we didn't seem to be able to do anything about it. And we really, for the first time, I think that winter—we had always accepted the fact that Tracy—let me back up. When the doctor diagnosed Tracy at the age of one, I recall in my

naive way I recall asking the doctor how long is Tracy going to live. And he said, Mr. Horton, I can't tell you. He said I could tell you that people with your daughter's problem do not live a normal life. You know, but that's all I can tell you. She may

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live into her 40's. She may not live to be five. She may die a natural death. So that's all, but we had always accepted the fact that Tracy wouldn't live a normal life.

But I think it was that winter that we really became aware for the first time that she was quite mortal and that her physical problems seemed to be accelerating and piling one on top of the other. So anyway, Tracy would have been forced to leave the school system in May and I think we pulled her out of school along about March. She became so sick that we just pulled her out of school and she never went back. We pulled her out late that winter, I guess it was after Christmas. She didn't finish that schoolyear. And the physical problems just seemed to—they just continued. Her legs were just swollen constantly and they go down briefly but then they swell back up again.

So there came a time when we realized after Tracy was out of a structured program that she wasn't getting any better, she just simply wasn't. It really bothered us that Tracy needed a structured program, but she also, we thought, badly needed regular medical care. I mean she needed nursing care that we were no longer able to give her. We were just in over our heads. While she was being seen by a doctor, there's so much that a doctor can do, and we felt, we knew all along, we knew

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that Hazelwood was in Louisville. The presence of the facility in Louisville was one important reason why we moved here, but Hazelwood did not exist when we moved here. We moved here in 1970. I don't think Hazelwood came into being until '71 or something. We came here because of the CP school and the other facilities that were available. So we just felt that—we talked to people. We picked as many people's brains as we could and they would say this child is going to need unremitting medical care probably for the rest of her life and you're doing—not only you're doing yourselves a disservice, but you're doing her a disservice and to deprive her of the medical care she needs.

Our house, our home was ill-equipped to deal with a child like her. We had—our bathing facilities were just terrible. As a matter of fact we couldn't even give her a bath. It was that bad. We had her in a hospital bed. She had been in a hospital bed for years and years, but anyway, I forgot what your question was, but there came a realization that Tracy needed the kind of help, medical help that we couldn't give her anymore. We were genuinely alarmed about her condition. We really were.

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Q Did the social worker that came to talk to you describe any other types of placements that might be available for Tracy aside from Hazelwood?

A She said that there were other programs available but not for a child like Tracy and they were not available at that time. She said, you know, for Tracy's particular needs, for her chronic health needs that I see right now Hazelwood is all we have. She said there are alternative programs, but nothing for her. I could tell that—I could tell that the social worker was trying to be very balanced in the advice she was giving us. She didn't want to talk Hazelwood up and she didn't want to talk it down. She

said here are the resources that are available that you have to decide and all of us have to decide what's best for her. But I thought she tried to be

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very careful and I guess that's necessary. It's a somber decision you have to make.

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Q Tell us about the trial to have her declared to be disabled.

A Well, we were just appalled. We couldn't believe it. We thought, my God, the judge looks at this child and examines her and talks to her. She cant's talk obviously. I mean it's clear that the child is totally, permanently disabled. We thought he signs a paper and that's the end of it, but it wasn't that way at all. Sharon had to go on the witness stand and I thought treated pretty badly. Anyway Tracy's council in talking to the jury never did say don't do this. She said to the jury that be aware of what you're doing, be aware of the seriousness of what you're doing. If you declare somebody disabled you're taking away their right to vote. You're taking away their right to ever enter into a contract. You're taking away their right to marry and two or three other things. So anyway the jury declared her total, permanently disabled. Judge Merrill signed the order and I guess that was in the fall of '86 I suppose. I guess that's when that was. But it was—we just weren't in any way braced or prepared for what we were going to encounter. We didn't know there was going to be an

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adversarial proceeding. We thought anybody with eyes in their head would see that this child is profoundly retarded, you know.

Q Did you find it to be adversarial in nature?

A Oh, yeah. I mean Sharon was treated as of she were a cruel Mother. What kind of parents would do this to a child. It was extremely adversarial.

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Q After the court made the finding of probable cause I assume that Tracy remained at Hazelwood?

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A She remained at Hazelwood. The first trial was scheduled, which was to be a 60-day commitment there.

Q Was that a jury a trial too?

A That was a jury trial. The probable cause hearing at Central State was not a jury trial, but this trial was a jury trial and I guess of a jury of six. This was held at the courthouse building.

Q Was Tracy represented by counsel?

A Tracy was represented by counsel, Rita Ward. Rita Ward represented Tracy throughout all of her travails or our travails of this whole period. So beginning with the second trial is when the anguish really came home. It was nothing—the guardianship trial, which we thought was so brutal, so hard on us, was nothing compared to these jury trials. You're talking about strong, harsh cross-examination of the Mother, and just accusations, insinuations that we were bad parents and the attorney on more than one occasion said to the jury, what kind of a parent would put a child in an institution. What kind of parent would do that? Have you all ever seen Hazelwood? Those concrete block walls out there and that drab, dreary environment. Who would do that? What kind of parent would do that? We were just held up to ridicule and scorn, we thought, and bear in mind that we were

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obviously oversensitive to this, extremely oversensitive. It was the most emotional and traumatic thing ever, but bearing in mind we were oversensitive. I still believe everything I'm telling you, that we were—we believe we were treated very badly by this whole process and I think that our system has to show sensitivity to these parents, like ourselves who come into this process so distraught and carry so much emotional baggage. We don't think we ought to be treated this way. We were treated badly we thought, but the jury held that she should be admitted.

Q You mentioned just a second ago that the parents of mentally retarded children like yourselves go into these proceedings carrying a lot of emotional baggage. What do you mean by that?

A Well, we're filled with guilt over the fact that number one we had a retarded child, so that makes you think there's some kind of defect in your genes or in your family history. You know, you're always wondering what caused this and I know I talked to my Mother. Did we ever have anybody in our family that was retarded and she said well, you had a second cousin that was spastic. You start looking at all these things and then you wonder about—the Mother wonders what did I do? Did I do something silly? Did I go swimming or did I lift

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something I shouldn't have. You always are questioning whether you did something or you might have done something or something you ate or something you drank. Back then, you know, there were few precautions and few restrictions on what you did. They just said take care of yourself and don't do anything stupid, you know, don't go mountain climbing, you know. Now, we know of a lot of things that we eat and drink, but we didn't know that and we still don't know that. So you're always wondering what did we do or what did we not do that might have caused this child to be retarded.

And then second and even worse is the growing realization that you're not capable of meeting her ongoing needs and that gives you some guilt. You know, when you realize we don't—we're not physically equipped, we're not psychologically equipped, we're not emotionally equipped. We don't have the professional training to meet this child's needs on an ongoing minute to minute, day-to-day basis. And that makes us feel guilty because, you know, you want to be able to care for your children, and you know, using whatever gifts God has given you, whatever intelligence and energy God has given you is to care for your children and that's hard when you recognize you can't, and things have gotten out of control and you're not up to it anymore. And we've had a lot of

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guilt about that and that's something we'll have for the rest of our lives, you know, that we might have caused her retardation and we were unable to do everything that she needed. It's very difficult to entrust your child to someone else. We were used to sending our children out of the nest and seeing them marry a man or woman and turn them over to some adult, you know, to go on to a happy life and it's difficult to turn your child over to an institution to meet her very basic needs just because you're not able to anymore. But you know, we would never ever, ever have taken Tracy to Hazelwood if we weren't convinced that's what she needed. This was a act of love, you know, in taking her out there. Our child was dying. There was no doubt in our mind that she was.

Q Did any of the medical experts that treated her or that evaluated her as part of the guardianship proceeding or the involuntary commitment process disagree with the decision to place her in Hazelwood?

A No, as a matter of fact our doctor had urged Sharon to do that for sometime. I mean he wanted her to recognize that it was going to come to that she couldn't care for Tracy and he said there's going to be a time when you can't meet this child's needs and I can remember her—we didn't have a pediatrician. We had a

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GP who served as our pediatrician and he told us when Tracy was an infant, right after she was diagnosed, that you ought to consider—you ought to consider putting her in an institution and we would have no part of that. We were just determined we were going to care for her for as long as we were humanly able to.

* * * * * * *

Civil Action No. C 82-0738-L(A)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

SAMUEL DOE, et al. - - - - - - - - - *Plaintiffs,*

v.

HARRY J. COWHERD, M.D., Secretary,
Cabinet for Human Resources - - - *Defendant.*

MEMORANDUM OPINION

This class action pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983, challenging the procedures governing admissions and discharges at Kentucky's Mental Retardation Residential Treatment Centers [hereinafter "MRRTCs"] is submitted to the Court on plaintiffs' motion for summary judgment and preliminary injunction. For the reasons set forth below, the Court will enter partial summary judgment in favor of plaintiffs and a preliminary injunction in accordance with that partial judgment.

Plaintiff Doe filed this action in 1982 alleging that the procedures by which he and others had been admitted and retained at Kentucky's MRRTCs were unconstitutional. In a memorandum opinion entered November 20, 1986, this Court held that mentally retarded adults are entitled to a "judicial hearing and determination of the propriety of the commitment," either prior to the involuntary commitment or as soon as practicable thereafter. *Doe* v. *Austin,*[1] 668

Supp. 597, 600 (W.D. Ky. 1986), *aff'd in part, rev'd in part,* 848 F.2d 1386 (6th Cir.), *cert. denied,* 109 S.Ct. 495 (1988).

We also held that contrary to the 1986 amendments to K.R.S. 202B, applications by parents or guardians for commitment of mentally retarded family members or wards are *not* voluntary commitments, *id.;* that the Equal Protection Clause requires a judicial hearing and determination prior to commitment, *id.* at 601; and that the Due Process Clause requires periodic review of any commitment decision. *Id.* We, therefore, enjoined the defendant Secretary from committing allegedly mentally retarded adults to any MRRTC without first providing a judicial hearing to determine whether such individuals should be committed. *Id.* at 602.

On appeal, the United States Court of Appeals for the Sixth Circuit agreed that commitments of mentally retarded adults on applications by parents or guardians are, in actuality, involuntary. *Doe* v. *Austin,* 848 F.2d 1386, 1392 (6th Cir.), *cert. denied,* 109 S.Ct. 495 (1988). The Court of Appeals also agreed that Kentucky's procedures did not conform with the requirements of due process. *Id.* at 1394. As explained by the Sixth Circuit, although due process does not require full-blown judicial hearings prior to involuntary commitments of mentally retarded adults, due process does require that "mentally retarded adults in Kentucky receive, at a minimum," the six procedural safeguards established in *Vitek* v. *Jones,* 445 U.S. 480, 494-95 (1980).[2] *Doe* v. *Austin,* 848 F.2d at 1393-95.

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[1] Defendant Cowherd, Secretary of the Cabinet for Human Resources, was substituted for his predecessor, Elbert Austin, pursuant to Fed.R.Civ.P. 25 (d)(1).

[2] In *Vitek* v. *Jones,* the Supreme Court affirmed the district court's decision that due process was violated by a statute allowing the transfer of a prisoner to a mental facility upon a finding by a physician that the prisoner suffered from a "mental disease or defect" and could not be given "proper treatment" in the prison.

(Footnote continued on next page)

Finally, the Sixth Circuit held that because Kentucky provides judicial hearings for the admission of *mentally ill adults to mental* health facilities, equal protection requires that Kentucky also provide judicial hearings for the admission of mentally retarded adults to MRRTCs. *Id.* at 1394-95. Likewise, the Sixth Circuit held that as Kentucky provides periodic judicial review for committed mentally ill adults, equal protection requires that Kentucky also provide some form of periodic review for committed mentally retarded adults. *Id.* at 1394-96. As to the formulation of these review procedures, the Sixth Circuit remanded the matter on the grounds that such a task was best left to the district court as it would have the benefit of compliance plans submitted by the parties. *Id.* at 1396 n.9.

Following the Supreme Court's denial of the Secretary's petition for a writ of certiorari, the parties began negotiating a compliance plan to implement the above-referenced holdings. In September 1989 they submitted a proposed Agreed Final Compliance Plan. This plan proposed procedures different from those enjoined and would have required Kentucky to give the same rights to mentally retarded

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(Footnote continued)

Doe v. *Austin*, 848 F.2d 1386, 1393 (1988), quoting *Vitek*, 445 U.S. at 483-84. The Supreme Court also approved the following procedures: (1) written notice of proposed action; (2) a subsequent hearing at which evidence relied on is presented, and the prisoner is allowed to testify and to present documentary evidence; (3) an opportunity to present witnesses on one's own behalf and to cross-examine adverse witnesses; (4) an independent decisionmaker who also has the authority to implement the decision; (5) a written statement by the factfinder setting forth the evidence and the reasons for the decision and transfer, if any; and (6) qualified and independent assistance provided to the prisoner. *Doe*, 848 F.2d at 1393-94, citing *Vitek*, 445 U.S. at 494-95.

adults with respect to involuntary commitments as is given to mentally ill adults.

However, in the meantime, the 1990 Kentucky General Assembly enacted House Bill 511 [hereinafter "HB 511"], an entirely new version of K.R.S. 202B for governing admissions and discharges of mentally retarded persons. Under HB 511, codified as the 1990 amendments to K.R.S. 202B, the previous incorporation by reference in K.R.S. 202B.050 to the rights of mentally ill persons established in K.R.S. 202A was totally eliminated.

Plaintiffs contend that under HB 511, they "again lack procedural protections" in admissions and discharges at MRRTCs. According to the plaintiffs, under the new law the rights of mentally retarded adults to the safeguards found in the civil commitment procedures afforded to mentally ill adults under K.R.S. 202A have been impermissibly narrowed to such a degree that their constitutional rights are once again at issue. Plaintiffs' Mem. at 4.

Plaintiffs first challenge the voluntary admission procedure established in § 4 (2) of HB 511 for admission of mildly or moderately mentally retarded adults without a judicial hearing. Section 4 (2) provides, in pertinent part, as follows:

> Upon the recommendation or approval of the interdisciplinary team of an ICF/MR,[3] a physician may . . . admit a mildly or moderately mentally retarded adult person who applies voluntarily [for admission] and who, in the opinion of the physician, possesses the mental capacity to give informed consent for admission.

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[3] Although HB 511 amends MRRTC to ICF/MR [Intermediate Care Facility], this opinion will continue to use the MRRTC terminology.

Plaintiffs argue that this procedure conflicts with this Court's prior opinion and order and fails to provide procedures for safeguarding against the risk that a so-called voluntary admission would be "neither informed nor truly voluntary." Plaintiffs' Mem. at 8. Plaintiffs contend that the holding in the memorandum opinion entered January 9, 1986, was different from the holding in the memorandum opinion entered November 20, 1986, in that the latter opinion held that *all* mentally retarded adults, not only *mildly or moderately* retarded adults, were entitled to judicial hearings prior to admission. *Doe* v. *Austin,* 668 F.Supp. at 602.

After reviewing these opinions, this Court is convinced that its intent consisted of requiring judicial hearings only for those mentally retarded adults who could not *personally* apply with informed consent for voluntary admission. *See also,* Defendant's Mem. at 11-13. Therefore, the Court finds no conflict with its prior order. Likewise, the Court believes the new procedure under § 4(2) granting voluntary admissions where a staff physician makes the determination of an applicant's mental capacity for informed consent does not violate the Constitution.

Plaintiffs direct their next argument to the fact that HB 511 does not contain any provisions allowing voluntarily admitted residents to be released upon their own request. The absence of such a provision is in contrast to K.R.S. 202A.021(3) allowing the discharge of voluntarily admitted mentally ill patients who request release in writing. Plaintiffs contend that under § 4 (3) of HB 511, mentally retarded adults who voluntarily enter MRRTCs surrender their ability to leave the facility voluntarily.

Section 4 (3) provides as follows:

> Upon recommendation or approval of the interdisciplinary team of an ICF/MR, the physician shall discharge any voluntarily admitted resident whose care and treatment in the ICF/MR is determined to be no longer necessary or advisable.

In response to plaintiffs' arguments and concerns, the defendant Secretary admits that:

> he would have no authority to detain a voluntarily admitted patient who requested discharge without implementing the involuntary admission procedures contained in House Bill 511. The only basis for permitting the voluntarily admitted patient to receive treatment and habilitation . . . would be the patient's consent. . . . Once that consent is withdrawn, defendant would have no choice but to immediately discharge the patient or institute involuntary admission proceedings.

Def.'s Mem. at 17-18.

The Secretary further admits that "persons voluntarily admitted to CHR's mental retardation facilities have a right to release upon their request." Def.'s Mem. at 18, citing *Kentucky Ass'n of Retarded Citizens* v. *Conn,* 510 F.Supp. 1233, 1249 (W.D. Ky. 1980), *aff'd,* 674 F.2d 582 (6th Cir. 1982), *cert. denied,* 459 U.S. 1041 (1982). Despite this admission, the Secretary also argues that mentally retarded adults "have other constitutional and federal statutory rights not specified in House Bill 511," and the statute's silence as to those other rights does not mean that the Kentucky legislature intended to eliminate those rights "merely by failing to enumerate" them." Def.'s mem. at 18.

The Court disagrees. The right to release upon request is an extremely important right; and in this Court's opinion, it cannot be protected by statutory silence. Moreover, the Court also believes the Secretary's assurances that the right of release will be honored represents an inadequate basis for protecting the right, especially in the face of a statutory provision conditioning discharges of voluntarily admitted residents on actions by the facility's interdisciplinary team. Therefore, we hold the § 4 (3) of HB 511 is unconstitutional to the extent that it governs the release of voluntarily admitted adults without any reference to such residents' right to release upon request.

Plaintiffs next argue that HB 511's use of the clear and convincing standard of proof for involuntary commitments of mentally retarded persons violates equal protection. For the involuntary commitment of mentally ill persons, the Kentucky legislature mandates that the manner of the proceedings and the rules of evidence shall be the same as in any criminal proceeding, including the evidentiary burden of beyond a reasonable doubt. K.R.S. 202A.076(2). The legislature's enactment in § 15 (2) of the lower clear and convincing standard for the civil commitment of mentally retarded individuals thereby denies protection provided by state law to the mentally ill. Plaintiffs contend that no legitimate state interest is served by the lower burden of proof placed upon Kentucky. Nor can the state, according to plaintiffs, demonstrate a rational basis for distinguishing between the mentally ill and the mentally retarded. We also agree with plaintiffs that the threat to personal liberty is identical for both classes of persons.

The Secretary defends the lower burden of proof by pointing to *Addington* v. *Texas*, 441 U.S. 418 (1979), which holds that the Due Process Clause of the Fourteenth Amendment requires the use of the clear and convincing standard of proof in civil commitment proceedings involving the mentally ill. *Id.* at 431-32. However, as this Court reads *Addington*, it does not prohibit the use of the criminal reasonable doubt standard. Rather, as stated by the Supreme Court, "the substantive standards for civil commitment may vary from state to state, [and] procedures must be allowed to vary so long as they meet the *constitutional minimum.*" *Id.* at 431 (emphasis added). Here, the Kentucky legislature has elected to distinguish between mentally ill persons and mentally retarded persons, a situation which the *Addington* Court did not address.

This Court believes that *Doe* v. *Austin*, 848 F.2d at 1394, citing *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), mandates that mentally retarded persons be afforded the same protections as are mentally ill persons when facing involuntary commitment. Although differences admittedly exist between mentally ill and mentally retarded persons, "mere identification of differences is not enough; equal protection 'require[s] that a distinction made have some relevance to the purpose for which the classification is made.'" *Doe* v. *Austin*, 848 F.2d at 1394, quoting *Baxstrom* v. *Herold*, 383 U.S. 107, 111 (1966).

Here, while it may be true that mental retardation is easier to diagnose then mental illness, and further, that it is easier for a factfinder to reach a decision with reference to mental retardation then with reference to mental illness, we believe such facts are of constitutional significance only in determining how often to review the commitment of persons who are mentally retarded.

Under Kentucky law, "when a proceeding may lead to the loss of personal liberty, the defendant in that proceeding should be afforded the same constitutional protection as is given to the accused in a criminal prosecution." *Denton* v. *Commonwealth*, 383 S.W.2d 681, 682 (Ky. App. 1964); *see also*, *Messer* v. *Roney*, 772 S.W.2d 648 (Ky. App. 1989). In a criminal action, only two parties are involved: the government and the accused. If a judgment of acquittal is entered, the case ends. An appeal is not permitted. Here, we believe those protections which are given to mentally ill persons must be extended to mentally retarded persons facing civil commitment proceedings.

We, therefore, hold that § 15 (2) of HB 511 allowing mentally retarded persons to be committed under the clear and convincing standard of proof is unconstitutional under the Equal Protection Clause. We also hold unconstitutional under equal protection and due process §§ 13, 15 (3), and 22 of HB 511 allowing third parties, for example, parents or guardians, whose interests may be adverse to the mentally retarded person facing commitment, to participate in all aspects of the proceedings "as if" parties, including appeals of decisions they regard as adverse.

Finally, we address plaintiffs' argument that § 20 of HB 511 violates the Equal Protection Clause by denying to mentally retarded persons confronted with involuntary commitment proceedings legal services and representation provided by the Kentucky Department of Public Advocacy except as a last resort, that is, only after it is determined that private counsel is unavailable, either through court appointment or by inability to retain. This provision is in contrast to K.R.S. 202A.121, which automatically gives to mentally ill persons facing involuntary commitment hearings legal counsel from the Department of Public Advocacy. Although mentally retarded persons or those acting on their behalf might prefer legal services from the Department of Public Advocacy, we do not believe that § 20's directives deprive mentally retarded persons from receiving effective legal assistance. As such, we do not regard § 20 as violative of the Constitution.

We have entered this date partial summary judgment for the plaintiffs in accordance with this opinion and a preliminary injunction in accordance with the partial summary judgment.

Date: July 1, 1991

/s/ Charles M. Allen
Charles M. Allen, Senior Judge

cc: Counsel of Record

Civil Action No. C 82-0738-L(A)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Samuel Doe, et al. - - - - - - - - *Plaintiffs,*

v.

Harry J. Cowherd, M.D., Secretary,
Cabinet for Human Resources - - - *Defendant.*

PARTIAL SUMMARY JUDGMENT AND PRELIMINARY INJUNCTION

This action having come before the Court on plaintiffs' motion for summary judgment and preliminary injunction, and the parties having submitted their memoranda, responses and replies, and the Court having entered its memorandum opinion, accordingly,

It Is Hereby Ordered And Adjudged that:

1. Plaintiffs are granted partial summary judgment and a preliminary injunction in accordance with that judgment as set forth below in subsections 2 and 3.

2. Sections 13, 15 (2), 15 (3), and 22 of House Bill 511 are unconstitutional; and therefore, defendant is enjoined from applying or enforcing these provisions.

3. Section 4 (3) of House Bill 511 is unconstitutional inasmuch as it provides for the discharge of voluntarily admitted mentally retarded adults without stipulating that such residents have a right to release upon their own request; and therefore, defendant is enjoined from using or

applying this provision where a voluntarily admitted mentally retarded resident requests release.

4. Plaintiffs are denied their motion for summary judgment on the other challenged sections of House Bill 511.

5. Pursuant to Fed.R.Civ.P. 65(c), plaintiffs shall give security in the amount of One Hundred Dollars ($100.00)

Date: July 1, 1991

/s/ Charles M. Allen
Charles M. Allen, Senior Judge

cc: Counsel of Record

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

No. 91-5932

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SAMUEL DOE, by his mother and next friend,
Mary Doe, on behalf of himself and all
others similarly situated, - - *Plaintiffs-Appellees,*

v.

HARRY J. COWHERD, - - - - *Defendant-Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

OPINION—Decided and Filed June 1, 1992

Before: KEITH, Circuit Judge; LIVELY, Senior Circuit Judge; and COHN, District Judge.*

KEITH, Circuit Judge. Defendant Harry J. Cowherd ("defendant") appeals the judgment of the district court ordering the State of Kentucky to amend its release and admissions procedures for mentally retarded persons at the State's institutions. For the reasons outlined below, we AFFIRM in part and REVERSE in part.

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*The Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

I.

This is a class action brought pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983. Plaintiff Samuel Doe ("plaintiff") is a mentally retarded adult who currently resides in a Kentucky Mental Retardation Residential Treatment Center ("RTC"). Plaintiff represents a class of citizens who are similarly situated to him as involuntarily committed adults in a Kentucky RTC. Defendant is Secretary of the Kentucky Cabinet for Human Resources. He appeals the July 1, 1991, judgment of the district court for partial summary judgment and preliminary injunction in favor of plaintiffs. The district court ordered the State of Kentucky (the "State") to amend its procedures for admissions and release of both voluntary and involuntary adults at RTCs.

The issues raised by the instant case stem from issues previously addressed by the Court in *Doe* v. *Austin*, 848 F.2d 1386 (6th Cir.), *cert. denied*, 488 U.S. 967 (1988). In *Austin*, we reviewed Kentucky's admission procedures for mentally retarded adults. Prior to our decision in *Austin*, Kentucky involuntarily committed mentally retarded adults to its RTCs without the benefit of a hearing. However, the State considered virtually all of its mentally retarded admissions to be voluntary. For example, the State treated those admissions that were initiated by the parent or guardian of the mentally retarded adult as voluntary. We held in *Austin* that mentally retarded adults are involuntary committed when admission is made upon the application of a parent or guardian. We also held that mentally retarded adults are entitled to procedural due process prior to being committed involuntarily.

The State is again before us challenging the district court's expansion of the principles which we enunciated in *Austin*. There are three issues raised in this appeal. The first is whether the State must implement a written provision that adults who are voluntarily admitted into a RTC

must be released upon their request. Second, we are asked to determine whether the State must satisfy the "beyond a reasonable doubt" burden of proof in order to involuntarily commit a mentally retarded adult. The final issue is whether the State is prohibited from allowing relatives of a mentally retarded adult to join as parties in an action to involuntarily commit the mentally retarded person. The district court answered each of the above questions affirmatively. We reverse the district court's judgment as the first issue, and affirm on each of the remaining issues for the following reasons.

II.

In 1990, the Kentucky General Assembly enacted House Bill 511 which revised Ky. Rev. Stat. Ann. Chapter 202B. Our decision in *Austin* was based on the provisions of Chapter 202B, which governed admissions and discharges of mentally retarded persons.

Plaintiff's first challenge relates to § 4(3) of H.B. 511, which establishes that:

> Upon recommendation or approval of the interdisciplinary team of ICF/MR, the physician shall discharge any voluntarily admitted resident whose care and treatment in the ICF/MR is determined to be no longer necessary or advisable.

According to plaintiff, the statute is constitutionally infirm because it fails to provide for the release of a voluntarily admitted patient upon their request. The State asserts that although the statute does not explicitly provide for voluntarily admitted patients to be released upon request, the State does recognize such a right. The district court stated, however, that "[t]he right to release upon request is an extremely important right; and . . . it cannot be protected by statutory silence." Accordingly, the district court held that § 4(3) of H.B. 511 is unconstitutional to the extent that it fails to provide for the release of voluntarily admitted adults upon their request.

The State contends that we lack jurisdiction to decide this issue because the instant case fails to present an actual case or controversy. It contends that this Court may strike down legislation only at the instance of one who is himself immediately harmed or immediately threatened with harm by the challenged action. *See Poe* v. *Ullman*, 367 U.S. 497 (1961). We agree.

As a threshold matter, the class represented by plaintiff consists of involuntarily admitted patients. The challenged action affects mentally retarded adults who are voluntarily committed to a RTC. Therefore, the class represented in this action cannot be affected by the challenged action. Moreover, plaintiff has not shown that any voluntarily admitted patient has requested and been denied release from a Kentucky institution. Thus, there is no evidence of any harm whatsoever. Accordingly, we agree that there is no actual case or controversy arising from the instant action, and we reverse the district court's decision on this issue.

The next issue relates to H.B. 511's use of the clear and convincing standard of proof for involuntary commitments of mentally retarded adults. The State uses the beyond a reasonable doubt standard of proof for involuntary commitments of mentally ill adults. Plaintiff successfully argued before the district court that the lesser standard of proof for the mentally retarded violates equal protection.

At the time we decided *Austin*, Ky. Rev. Stat. Ann § 202B.050 provided that:

> All rights guaranteed by [Ky. Rev. Stat.] Chapters 202A (other than those rights enumerated in [Ky. Rev. Stat.] 202A.026 and 202A.051) and [Ky. Rev. Stat.] Chapter 210 to mentally ill persons shall apply to mentally retarded persons.

Ky. Rev. Stat. Ann. Chapter 202A provided for substantial procedural due process prior to the involuntary commitment of mentally ill patients. The rights for mentally ill patients included the right to a preliminary hearing before a person could be involuntarily committed to a state institution, the right to a final hearing and the right to a jury trial. The statute also provided for the right to counsel, the right to testify, present witnesses and cross-examine adverse witnesses, and the right to be present during proceedings.

In *Austin*, we specifically addressed the question of whether mentally retarded adults are entitled to procedural due process prior to being involuntarily committed. Because the State provided for mentally ill adults to receive a hearing prior to being involuntarily committed, we questioned whether there was any rational basis for denying a hearing to mentally retarded adults. The State failed to show any rational basis for differentiating between mentally retarded and mentally ill adults in the provision of a hearing prior to involuntary commitment. Accordingly, we held that equal protection required that the mentally retarded be given a hearing prior to their involuntary commitment. We fail to see any reason for the State to now believe that a substantially lessened burden of proof should govern those hearings for the mentally retarded.

The State asserts that there are several relevant differences between mentally ill and mentally retarded persons which provide a basis for the different standards of proof. It is clear that "the mere identification of differences is not enough; equal protection 'require[s] that a distinction made have some relevance to the purpose for which the classification is made.'" *Austin*, 848 F.2d at 1394, citing *Baxstrom* v. *Herold*, 383 U.S. 107, 111 (1966). We do not believe that there are any differences between these two classes or the purposes for their commitment which are relevant to the due process which they are entitled to receive.

The State asserts that the purposes for committing mentally retarded persons are different from the purposes for committing mentally ill persons. For example, the State asserts that mental retardation is a permanent, incurable condition, but mental illness can be, and usually is, successfully treated. According to the State, mentally retarded persons are not "treated" but are "habilitated" on a continuing basis. The State asserts that the services at mental retardation facilities are less "intrusive" than those provided for mentally ill patients. The State also contends that there is a stigmatization associated with mental illness that does not attach to mental retardation.

The State's assertions are unsupported by any evidence in the record. There is no evidence whatsoever to show that mentally retarded persons are not "stigmatized," or that the treatment that they receive is less "intrusive" than the treatment administered to mentally ill persons. There is also dispute as to whether mentally retarded persons can be treated so as to improve their condition. The mere assertion of distinctions is clearly insufficient to justify lessened standards to prove that a mentally retarded person should be institutionalized.

Moreover, the issue raised in this case relates to the *liberty* of mentally retarded persons who are threatened with involuntary commitment. Regardless of the asserted benefits of institutionalization, it nevertheless results in the loss of personal liberty. Yet the State seeks to curtail the liberty interests of the mentally retarded under more liberal standards than those standards used for mentally ill adults.

Kentucky law provides that "when a proceeding may lead to the loss of personal liberty, the defendant in that proceeding should be afforded the same constitutional protection as is given to the accused in a criminal prosecution." *Denton* v. *Commonwealth*, 383 S.W.2d 681, 682 (Ky. App. 1964). The mentally ill and mentally retarded are identical insofar as they lose their personal liberty by involuntary institutionalization. Accordingly, we hold that equal protection requires that the reasonable doubt standard of proof must apply in proceedings to involuntarily commit mentally retarded adults in Kentucky.

We also affirm the district court's holding that Kentucky's practice of allowing third parties to participate in the involuntary commitment proceeding of mentally retarded adults violates equal protection and due process. In *Austin*, we held that the decision to commit a mentally retarded adult is not within the discretion of his or her parents or guardians. *Austin*, 848 F.2d at 1386. Moreover, as recognized by the district court, these parties' interests may be adverse to the person facing commitment. Thus the inclusion of third persons as parties to the action (including the right to appeal decisions which they find adverse) imposes a greater burden than is imposed on similarly situated mentally ill adults. The State has advanced no rational basis for this distinction.

III.

For the above stated reasons, we AFFIRM in part and REVERSE in part.

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Supreme Court, U.S.
FILED
DEC 7 1992
OFFICE OF THE CLERK

No. 92-351

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

LEONARD E. HELLER, Secretary,
KENTUCKY CABINET FOR HUMAN
RESOURCES - - - - - - - - Petitioner

versus

SAMUEL DOE, by His Mother and
Next Friend, MARY DOE, Et Al. - Respondents

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

BRIEF FOR PETITIONER

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December 8, 1992

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55W

QUESTIONS PRESENTED

1. CHR's admission of mentally retarded adults to its ICF/MR facilities as voluntary residents upon the substituted consent of their legal guardians and after independent professional review does not violate either Due Process or Equal Protection.

2. Kentucky's utilization of the "clear and convincing" standard of evidence for the involuntary hospitalization of the mentally retarded and the "beyond a reasonable doubt" standard for involuntary hospitalization of the mentally ill does not violate Equal Protection.

3. Involuntary hospitalization procedures which permit a mentally retarded person's immediate family or legal guardian to participate in the proceedings as though a party therein do not deprive the mentally retarded person of his right to Due Process of Law.

4. Sufficient differences exist between the mentally retarded and the mentally ill to constitutionally permit a State to adopt procedures which permit the immediate family and legal guardians of mentally retarded persons to participate in involuntary hospitalization proceedings for the mentally retarded without adopting procedures for the immediate family and legal guardians of mentally ill persons to participate as parties in involuntary hospitalization proceedings for the mentally ill.

LIST OF PARTIES

The petitioner in this proceeding is Leonard E. Heller, Secretary of the Kentucky Cabinet for Human Resources.

The respondents in this proceeding are Samuel Doe (a fictitious name), by and through his mother and next friend, Mary Doe, on his own behalf and as the representative of a class consisting of all mentally retarded persons in the Commonwealth of Kentucky who are presently committed or who may in the future be subjected to being committed to a state hospital, institution, or other mental retardation residential treatment center involuntarily on the basis of their condition of mental retardation and who contend that said involuntary commitment violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution, 29 U.S.C. § 794, and Kentucky Revised Statutes Chapters 202A, 202B, 210 and 31.

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No. 92-351

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

LEONARD E. HELLER, Secretary, KENTUCKY CABINET FOR HUMAN Resources - - - *Petitioner*

v.

Samuel Doe, by His Mother and Next Friend, MARY DOE, Et Al. - - - - - - - *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR PETITIONER

Now comes petitioner, Leonard E. Heller, Secretary of the Kentucky Cabinet for Human Resources, and for his Brief in the above-styled proceeding, states as follows:

OPINIONS BELOW

The Opinion of the Court of Appeals for the Sixth Circuit is reported *sub nom. Doe* v, *Cowherd* at 965 F.2d 109 (6th Cir. 1992) and is reprinted in the Appendix to the Petition for Writ of Certiorari at Page 1a-7a and in the Joint Appendix at Page 171-177.

The Memorandum Opinion and Preliminary Injunction of the United States District Court for the Western District of Kentucky from which the most recent appeal was taken is reported *sub nom. Doe* v, *Cowherd* at 668 F.Supp. 597 (W.D.KY 1991) and is reprinted in the Appendix to the Petition for Writ of Certiorari at Page 8a-18a and in the Joint Appendix at Page 160-170. This Memorandum Opinion was the fourth Opinion of the United States District Court in these proceedings.

The United States Court of Appeals for the Sixth Circuit has previously entered an Opinion in this matter that is reported *sub nom. Doe* v, *Austin* at 848 F.2d 1386 (6th Cir. 1988). This opinion is reprinted in the Appendix to the Petition for Writ of Certiorari at Page 19a-38a and in the Joint Appendix at Page 90-109.

The third Opinion of the United States District Court for the Western District of Kentucky is reported *sub nom. Doe* v, *Austin* at 663 F.Supp. 597 (W.D.KY 1986) and is reprinted in the Appendix to the Petition for Writ of Certiorari at Page 40a-48a and in the Joint Appendix at Page 79-87.

The second Opinion of the United States District Court for the Western District of Kentucky is not reported. The decision is reprinted in the Appendix to the Petition for Certiorari at Page 51a-59a and in the Joint Appendix at Page 64-74.

The initial Opinion of the United States District Court for the Western District of Kentucky is not reported. The decision is reprinted in the Appendix to the Petition for Certiorari at Page 60a-72a and in the Joint Appendix at Page 49-63.

JURISDICTION

The Opinion of the United States Court of Appeals for the Sixth Circuit was entered on June 1, 1992. The petition for writ of certiorari was filed on August 26, 1992 and was granted on October 19, 1992. 113 S.Ct. 373 (1992). The jurisdiction of this Court to review the Opinion of the Sixth Circuit rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 42 U.S.C. § 1983: Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

2. Amendment XIV, United States Constitution, Section 1: Citizenship; Due Process; Equal Protection.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is a class action brought on behalf of all mentally retarded persons in Kentucky who have been admitted or face admission to the intermediate care facilities for the mentally retarded administered by the Kentucky Cabinet for Human Resources (CHR). The issues addressed below concern under what circumstances a mentally retarded person could be voluntarily admitted by himself or his legal guardian to a state operated facility and what proceedings were required for an involuntary admission. The decisions below addressed the admission procedures in effect in 1982 when the complaint was filed and the procedures adopted by the Kentucky General Assembly in response to this litigation in 1986 and 1990.

Petitioner, Leonard E. Heller[1], is the chief executive and administrative officer of CHR. CHR is the state administrative agency which operates Kentucky's programs for the mentally retarded, including the Commonwealth's four intermediate care facilities for the mentally retarded (ICF/MR's)[2]. Through these facilities, formerly called mental retardation residential treatment centers, CHR provides habilitative services and training in basic living skills to the mentally retarded in a residential setting.

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[1] Harry J. Cowherd, appellant below, resigned from his position as Secretary of CHR effective December 29, 1991 and was succeeded in office by Leonard E. Heller. Pursuant to F.R.Civ.P. 25(d)(1), Leonard E. Heller has automatically been substituted as the interested party in this action.

[2] These facilities are Outwood ICF/MR located at Dawson Springs, Kentucky; Oakwood ICF/MR located at Somerset, Kentucky; Hazelwood ICF/MR located at Louisville, Kentucky; and Central State ICF/MR also located at Louisville, Kentucky.

Respondent, Samuel Doe, is a severely retarded adult who was a resident of one of CHR's intermediate care facilities for the mentally retarded at the commencement of this action in 1982. (Trial Record, hereafter R., 3, p. 5). Samuel Doe was admitted to Outwood ICF/MR as a "voluntary" admission upon application of his mother, Mary Doe, who is also his legal guardian and his next friend in this proceeding. (R. 3, p. 5). CHR has no knowledge of whether Samuel Doe remains an Outwood resident or whether he was discharged to a community residential placement by the facility staff or whether he was withdrawn from Outwood by his legal guardian because respondents have utilized fictitious names since the commencement of this action.

In order to understand what it means to say that someone is "severely retarded", a definition of the term and description of the various levels of retardation is required.

The most widely accepted definition of mental retardation was formulated by the American Association on Mental Deficiency (AAMD) in 1973 as follows:

> Mental retardation refers to significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period. Hughes, *Definition, Diagnosis, Classification and Associated Problems in Mental Retardation*, Law & Psychology Review, Spring, 1975, p. 17.

The AAMD's definition of mental retardation was adopted by the Kentucky General Assembly in Kentucky Revised Statute (KRS) 202B.010. (R. 34, p. 17).

An important feature of both the AAMD and Kentucky definitions of mental retardation is the dual criterion of deficits in both adaptive behavior and intellectual functioning. Adaptive behavior refers to the effectiveness or degree with which the individual meets the standards of personal independence and social responsibility expected of his age and cultural group. Hughes, *supra.*, p. 18. Thus, an individual with an IQ of 60 who demonstrated no significant impairment in adaptive behavior would not be considered mentally retarded. Hughes, *supra.*, p. 18.

The AAMD recognizes four levels of retardation measured by the degree of disability. The levels of retardation and the corresponding levels of intelligence, as measured by standardized general intelligence tests, and deviation in adaptive behavior are as follows:

Level of Retardation	Level of Deviation in Measured Intelligence	Corresponding IQ Range		Level of Deviation in Adaptive Behavior
		Stanford-Binet	Wechsler	
Mild	–2	52-68	55-59	–2
Moderate	–3	36-51	40-54	–3
Severe	–4	20-35	25-39	–4
Profound	–5	Below 20	Below 25	–5

Hughes, *supra.*, p. 21; (R. 34, p. 19).

A person with severe mental retardation generally functions at a level comparable with that of a normal two to three year old child. A profoundly retarded person generally functions at the level of a nine to twelve month old infant. (R. 36, p. 84).

There were 769 residents in CHR's four intermediate care facilities for the mentally retarded in 1985 (the most recent figures available in the record below). (R. 114, p. 1). The vast majority of these residents were severely or profoundly retarded. The typical resident of Hazelwood ICF-MR is profoundly retarded, nonverbal, nonambulatory, has no independent self-help skills, is not toilet trained and tends toward self-stimulation (i.e. self abuse). (R. 69, pp. 4-5). Mildly or moderately retarded individuals must have concomitant severe behavior problems or a substantial physical disability to satisfy CHR's admission criteria. (R. 36, p. 72).

At the time this action commenced, nearly all residents in CHR's ICF/MR facilities, including respondent Samuel Doe, had been admitted under CHR's "voluntary" admission procedures. The voluntary procedure was initiated by an application for admission filed by the parent of a minor or the legal guardian of an adult through one of the state's Community Mental Health Centers. (R. 36, pp. 12-13). The application required the Director of the Community Mental Health Center to certify that the needs of the mentally retarded person could not be met by services available in the community. (R. 73, p. 44). The application was accompanied by a psychological evaluation of the applicant; the applicant's school records; and the individual habilitation plans developed for the applicant by the Community Mental Health Center in its unsuccessful effort to provide services to the applicant in the community. (R. 36, p. 13).

The application and accompanying records were submitted to a CHR Record Review Committee which consisted, at a minimum, of a physician, a psychologist, a social worker, a registered nurse and a licensed practical nurse. (R. 36, pp. 11-12).

The factors considered by the Records Review Committee in determining whether to grant the application for admission included: (1) the availability of appropriate alternative residential and training programs in the community; (2) the availability of an appropriate place within an ICF/MR; (3) the severity of the applicant's retardation; (4) the status of the applicant's family situation; (5) the applicant's developmental history; (6) all previous efforts to provide services to the applicant; and (7) the applicant's need for basic services such as toilet training, basic survival skills, physical therapy and occupational therapy. (R. 36, pp. 19-21).

If the Records Review Committee determined that the applicant was appropriate for admission to an ICF/MR, the Committee then determined which facility was most appropriate for the applicant's needs. (R. 36, pp. 21-22).

If the applicant was a minor, admission to an ICF/MR following approval of the Records Review Committee could be made upon consent of the applicant's parents. If, however, the applicant was an adult, admission required the consent of the applicant's legal guardian. CHR considered such admissions "voluntary" and did not require the applicant's legal guardian to institute the judicial procedures for involuntary hospitalization set forth in KRS Chapter 202B. The adult applicant voluntarily admitted under these procedures could leave of his own volition or upon request for removal by his legal guardian. (R. 36, p. 27).

A guardian has specifically authority under state law to take custody of his ward and to establish his place of abode within the state, KRS 387.660(1), and to give any necessary consent or approval to enable his ward to receive medical or other professional care, counsel, treatment or service except for certain specified medical procedures. KRS 387.660(3). The guardian has specific duties to make provision for his ward's care, comfort and maintenance and to arrange for such educational, social, vocational and rehabilitation services as are appropriate and will assist his ward in the development of maximum self-reliance and

independence. KRS 387.660(2). A guardian must act with respect to his ward in a manner which limits the deprivation of his ward's civil rights and restricts his ward's personal freedom only to the extent necessary to provide needed care and services to the ward. KRS 387.660(4).

If a guardian should place his ward in a residential facility, the guardian must notify the state district court of such placement within thirty days. KRS 387.660(1). This notice must include: (1) the specific reasons for such placement; (2) an inter-disciplinary evaluation report detailing the social, psychological, medical or other considerations upon which the placement was predicated; (3) a description of the treatment or habilitation programs which will benefit his ward as a result of such placement; and (4) a determination that such placement will provide the ward with appropriate treatment in the least restrictive setting. KRS 387.660(1).

At least annually, a guardian must file a verified report with the state district court describing: (1) his ward's current mental, physical and social condition; (2) the addresses of every residence of his ward during the reporting period and the length of stay at each residence; (3) a summary of the medical, social, educational, vocational, and other professional services received by his ward during the reporting period; (4) an outline of the guardian's visits with and activities on behalf of his ward; (5) a recommendation as to the need for continued guardianship; and (6) such other information as may be requested by the court. KRS 387.670(1). Upon review of such reports, the state district court may take whatever action it considers necessary to enhance the well-being of the ward. KRS 387.670(3).

Placement of a mentally retarded person in a residential facility is not viewed by CHR as a permanent placement. (R. 36, pp. 15, 64). An inter-disciplinary team composed of the facility staff responsible for providing treatment and habilitation services to the residents conducts staffing monthly to assess each resident's need to remain at the facility. (R. 36, p. 30).

Neither respondent Samuel Doe nor his mother requested that he be discharged from Outwood; however, on October 25, 1982, respondents filed a complaint against the Secretary of CHR in the U. S. District Court for the Western District of Kentucky alleging that Samuel Doe, and the class he proposed to represent, was being involuntarily confined at Outwood without a precommitment judicial determination as required by KRS Chapter 202B and the Due Process and Equal Protection Clauses of the United States Constitution. (R. 3, p. 2). Respondents sought declaratory and injunctive relief under 28 U.S.C. §§2201 and 2202 and 42 U.S.C. §1983 to enjoin the Secretary from admitting persons to CHR's ICF/MR facilities without certain precommitment procedural safeguards, including the rights to notice, jury trial, counsel and postcommitment periodic judicial review. (R. 3, p. 13).

The preadmission and postadmission rights sought by Samuel Doe were available to persons involuntarily hospitalized at a CHR mental retardation facility by a judicial proceeding instituted under KRS 202B.050. This statute incorporated by reference all rights and procedures provided in the involuntary hospitalization of the mentally ill under KRS Chapter 202A. However, at the time of Samuel Doe's admission, less than 1% of the ICF/MR residents had been admitted on an involuntary basis. (R. 37, p. 22).

The District Court denied CHR's motion to dismiss, (R. 47) and certified a plaintiff class consisting of all mentally retarded persons in the Commonwealth of Kentucky who are presently committed or who may in the future be subjected to being committed to a state hospital, institution or other mental retardation residential treatment center involuntarily on the basis of their condition of mental retardation and who contend that their involuntary commitment violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment, 29 U.S.C. § 794, and KRS Chapters 202A, 202B, 210 and 31. (R. 60).

After the initial round of discovery, Samuel Doe moved for summary judgment on the issues presented in his complaint. (R. 76). The District Court entered Findings of Fact, Conclusions of Law and a Memorandum Opinion on March 28, 1984 which described the admissions procedures utilized by CHR and found that such procedures were consistent with the admissions procedures approved in *Parham* v, *J.R.*, 442 U.S. 524, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979) and its companion case of *Secretary of Public Welfare* v, *Institutionalized Juveniles*, 442 U.S. 640, 99 S.Ct. 2523, 61 L.Ed.2d 142 (1979). (R. 106, pp. 10-12). The District Court also found, however, that CHR had been pressured by some parents not to release their children from ICF/MR facilities and that such parental veto[3] was in violation of *Parham*, supra. (R. 106, p. 17).

CHR then moved for summary judgment to dismiss Doe's claims concerning CHR's voluntary admission procedures. (R. 111). Samuel Doe contemporaneously moved the District Court to reconsider the rulings contained within its Memorandum Opinion. (R. 113).

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[3] The parental veto practice was required by federal regulations governing the funding of health care services to residential and community placements. 42 CFR § 441.302(d) required that if a Medicaid recipient is determined eligible for ICF/MR placement, the recipient *or his legal guardian* must be "given the choice of either institutional or home and community-based services."

On January 9, 1986, the District Court entered its second Memorandum Opinion in which it reaffirmed its initial decision that CHR's voluntary admission procedures did not violate procedural due process. (R. 117, pp. 2, 5). However, the District Court found that admission of a mentally retarded person to an ICF/MR by his legal guardian could not be considered a "voluntary" admission because the ward lacked the capacity to consent to such admission and that all such admissions must be considered "involuntary." (R. 117, p. 3).

The District Court observed that KRS Chapter 202B required the same judicial proceedings be utilized prior to "involuntary" hospitalization of the mentally retarded as were utilized prior to involuntary hospitalization of the mentally ill and determined that Kentucky had legislatively determined that the two groups were similarly situated and entitled to the same procedural safeguards. (R. 117, pp. 4-5). The District Court then held that CHR's failure to provide the precommitment judicial procedures contained in KRS Chapter 202A prior to the admission of the mentally retarded to its facilities while providing judicial procedures prior to involuntary hospitalization of the mentally ill was a denial of equal protection. (R. 117, pp. 8-12).

The District Court recognized that mildly or moderately retarded persons could voluntarily admit themselves to an ICF/MR (R. 117, p. 9), but enjoined CHR from making any other admissions to its ICF/MR facilities unless the admissions were made under the statutory involuntary hospitalization procedures. (R. 118).

The 1986 Kentucky General Assembly responded to the District Court's interpretation of KRS Chapter 202B with certain amendments to that Chapter contained in House Bill 477 (1986 Kentucky Acts, Chapter 79). The amendments specified that the application by parents or guardians for placement of their child or ward in a mental retardation treatment center pursuant to the Records Review Committee procedure was not an "involuntary" commitment under KRS Chapter 202B. (R. 120, Appendix to Memorandum at p. 1-6).

Samuel Doe moved the District Court to enter summary judgment declaring that the 1986 legislation was unconstitutional and to enjoin its enforcement. (R. 120). CHR moved the District Court to reconsider its January 9, 1986 Opinion in light of the new legislation. (R. 121).

In its third Memorandum Opinion, the District Court observed that House Bill 477 effectively eliminated the rights of mentally retarded persons to a judicial hearing prior to commitment to an ICF/MR and that most admissions would be considered voluntary under the Act. (R. 126, p. 2). *Doe* v. *Austin*, 668 F.Supp. 597 (W.D. KY 1986). The District Court again observed that an admission to an ICF/MR by a guardian without the consent of the ward cannot be considered a "voluntary" admission, (R. 126, p. 6), and held that the admission procedures contained in the new act violated both Equal Protection and Due Process. (R. 126, pp. 7-8).

The District Court enjoined CHR from admitting any mentally retarded person over 18 years of age to its ICF/MR facilities without instituting prior judicial proceedings for involuntary hospitalization and from continuing to confine any mentally retarded person at such facilities who reached 18 years of age without instituting involuntary hospitalization proceedings. (R. 127, pp. 1-2).

CHR appealed the preliminary injunction to the Sixth Circuit Court of Appeals. The Sixth Circuit agreed with the District Court that admissions of mentally retarded adults to ICF/MR's must be considered involuntary admissions which are subject to due process safeguards. *Doe* v, *Austin*, 848 F.2d 1386, 1392 (6th Cir. 1988). The Sixth Circuit held that the minimal procedural safeguards which must be provided prior to admission to a state operated ICF/MR are the same as those set forth for the transfer of a convicted felon to a state mental hospital in *Vitek* v, *Jones*, 445 U. S. 480, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980). Those procedures are:

1. Written notice to the prisoner that a transfer to a mental hospital is being considered;
2. A hearing, sufficiently after the notice to permit the prisoner to prepare, at which disclosure to the prisoner is made of the evidence being relied upon for the transfer and at which an opportunity to be heard in person and to present documentary evidence is given;
3. An opportunity at the hearing to present testimony of witnesses by the defense and to confront and cross-examine witnesses called by the State;
4. An independent decisionmaker;
5. A written statement by the factfinder as to the evidence relied on and the reasons for transferring the inmate; and
6. Qualified and independent assistance must be provided to the inmate. *Doe* v, *Austin, supra.*, at 1393.

The Sixth Circuit disagreed with the trial court that Due Process required a judicial forum for the exercise of the required procedures; but agreed that Equal Protection required a judicial forum. The Sixth Circuit reasoned that Kentucky had legislatively declared the mentally retarded and the mentally ill were similar classes of persons by providing the same statutory procedures for their involuntary hospitalization, and that CHR did not demonstrate a basis for distinguishing between the two groups that was rationally related to their involuntary confinement. *Id.* at 1396. The Sixth Circuit reversed the District Court's decision as it related to Due Process and remanded the case for further proceedings.

CHR's petition for rehearing and rehearing en banc was denied on August 3, 1984. CHR's petition for writ of certiorari from the initial Opinion of the Sixth Circuit in this matter was also denied. 488 U.S. 967, 109 S.Ct. 495 (1988).

Following remand, the District Court directed the parties and *amicus* (parents and legal guardians of Doe's class) to attempt to draft a compliance plan that would implement the decision of the Sixth Circuit. (R. 161). It was anticipated by all parties that changes in state law would be required to implement the new admissions procedures.

While the parties were waiting for the District Court to act upon a tendered Agreed Compliance plan, the 1990 Kentucky General Assembly enacted sweeping revisions to KRS Chapter 202B in 1990 Kentucky Acts, Chapter 147 (denominated House Bill 511 in the opinions below). (R. 210, Exhibit 1).

The new legislation was a complete revamping of KRS Chapter 202B which incorporated many of the revisions to the Chapter required by the tendered Compliance Plan and also addressed other matters not specifically provided for in the Plan.

Samuel Doe moved the District Court to declare that numerous sections of the new legislation were unconstitutional and to enjoin enforcement of those sections. (R. 201).

In a Memorandum Opinion entered July 1, 1992, the District Court agreed with Doe regarding the following Sections of the new legislation:

A. Section 4(3) of House Bill 511, now codified as KRS 202B.021, which required an ICF/MR to discharge any voluntary patient[4] whose treatment and care in an ICF/MR was no longer necessary or advisable, was held unconstitutional to the extent it "governs release of voluntarily admitted adults without any reference to such resident's right to release upon request"; (R. 215, pp. 8-9).

B. Section 15(2) of House Bill 511, now codified as KRS 202B.160(2), which authorized commitment of mentally retarded persons upon the clear and convincing standard of evidence, was found to violate the Equal Protection Clause; and (R. 215, p. 11).

C. Sections 13, 15(3) and 22 of House Bill 511, now codified as KRS 202B.140, 202B.160(3) and 202B.230, which permitted the parents and legal guardians of mentally retarded persons to participate in all aspects of the involuntary commitment proceedings as if parties, were found to violate both the Equal Protection and Due Process Clauses. (R. 215, p 11-12). *Doe* v, *Cowherd*, 668 F.Supp. 597 (1991).

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[4] Section 4(2) of House Bill 511 permitted mildly or moderately retarded adults to voluntarily admit themselves to an ICF/MR provided a facility physician first determined that the mentally retarded person possessed sufficient mental capacity to provide his informed consent to the admission.

All other challenged Sections of House Bill 511 were found to adequately protect the constitutional rights of the mentally retarded. A preliminary injunction was entered to enjoin enforcement of the sections found unconstitutional by the District Court. (R. 216).

CHR again appealed the preliminary injunction to the Sixth Circuit Court of Appeals. (R. 217). No cross appeal was taken.

The Sixth Circuit agreed with CHR that the issue of the constitutionality of the mandatory release of the few remaining voluntary ICF/MR residents did not present a case or controversy and reversed the District Court on that issue. No proof was presented that any voluntary patient had ever been denied release and CHR had stipulated in the proceedings before the District Court that voluntary patients had the right to release upon request. *Doe* v, *Cowherd*, 965 F.2d 109, 112 (6th Cir. 1992).

The Sixth Circuit then addressed the standard of evidence which must be utilized for involuntary commitment of the mentally retarded. The standard adopted in House Bill 511 was the "clear and convincing" standard. However, KRS Chapter 202A required satisfaction of the "beyond a reasonable doubt" standard in proceedings for the involuntary hospitalization of the mentally ill. The Sixth Circuit found that there were no differences between the two classes for the purposes of their commitment which are relevant to the Due Process they are entitled to receive and affirmed the District Court's holding that Kentucky's utilization of the "clear and convincing" standard for involuntary commitment of the mentally retarded was a violation of Equal Protection. *Id.* at 112.

The Sixth Circuit also affirmed the District Court's holdings with regard to participation of the mentally retarded person's parents and guardian in the commitment proceedings. The Court observed that these individuals may have an interest that is adverse to the interests of the person facing commitment and their participation imposed a greater burden on the mentally retarded than that placed upon mentally ill adults facing involuntary hospitalization. *Id.* at 113.

CHR then sought relief from the decision of the Sixth Circuit through its petition to this Court for writ of certiorari.

SUMMARY OF ARGUMENT

Parham v, *J. R.*, 442 U. S. 524, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979) and *Secretary of Public Welfare* v, *Institutionalized Juveniles*, 442 U. S. 640, 99 S.Ct. 2523, 61 L.Ed.2d 142 (1979) upheld against Due Process challenge the admissions procedures of state mental hospitals which permitted parents and legal guardians of minors to substitute their consent for that of their child or ward to voluntary admission at such facilities provided the admission was reviewed and approved by a hospital physician.

Parham and *Institutionalized Juveniles* reached this result by balancing (i) the interests of the parents and legal guardians in obtaining necessary medical services for their children and wards; (ii) the children's liberty interest and their interest in receiving necessary medical treatment; (iii) the State's interest in providing necessary medical services to those in need of such services in a prompt and economical fashion without imposing complex and unnecessary procedural burdens upon the receipt of such services and (iv) the procedural safeguards provided by the medical decisionmaking model and the likelihood that other procedures would decrease the risk of erroneous decisions.

Parham and *Institutionalized Juveniles* held that the medical decisionmaking model was better suited for decisions to admit children in need of psychiatric services to state mental hospitals than the judicial decisionmaking model because the questions addressed were basically medical in character.

Balancing the factors described in *Parham* and *Institutionalized Juveniles* in the very similar situation presented when, subject to the review and approval of State mental retardation professionals, a legal guardian of a mentally retarded adult seeks necessary habilitation services for his ward from a State residential facility for the mentally retarded should likewise result in approval of the medical decisionmaking model for voluntary receipt of such services.

2. When, however, it becomes necessary for a State to seek authorization to provide habilitation services to a mentally retarded person which are opposed by the mentally retarded person or his legal guardian, the State should be permitted to establish the necessary prerequisites for the involuntary provision of such services by the "clear and convincing" standard of evidence even if the State requires the higher criminal standard in proceedings to involuntarily confine mentally ill persons to its state mental hospitals.

The "clear and convincing" standard of evidence was determined by this Court in *Addington* v, *Texas*, 441 U. S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979) to be the appropriate standard for civil commitments and the "beyond a reasonable doubt" standard of evidence was found to be inappropriate.

The Equal Protection Clause does not require that the mentally retarded be penalized by an inappropriate standard of evidence in their involuntary commitment proceedings simply because a State has improvidently required the inappropriate criminal law standard for its mentally ill. Moreover, sufficient differences exist between the mentally retarded and the mentally ill to provide a state legislative body with a rational basis for establishing different evidentiary standards for their respective involuntary commitment to State facilities for necessary services.

3. In the establishment of the procedures by which mentally retarded persons may be involuntarily compelled to receive State services, the States are free to develop such procedures as are not inconsistent with Due Process. Procedures which permit the persons who are immediately responsible for health and welfare of the mentally retarded person to participate directly in the involuntary commitment process do not impose an undue burden upon the retarded. At most, participation of such additional interested parties insures that the trier-of-fact will be presented with all necessary, available and relevant evidence before making the decision regarding involuntary commitment.

4. Sufficient differences exist between the mentally retarded and the mentally ill to provide a rational basis for a state legislature to prescribe involuntary commitment procedures for the mentally retarded which permit the retarded person's immediate family and legal guardian to participate in such proceedings as though a party thereto even though the immediate family and legal guardians of the mentally ill are not permitted to participate in proceedings for involuntary commitment of the mentally ill to state mental hospitals.

ARGUMENT

1. CHR's admission of mentally retarded adults to its ICF/MR facilities as voluntary residents upon the substituted consent of their legal guardians and after independent professional review does not violate either Due Process or Equal Protection.

Kentucky finds itself in this unenviable position because the District Court and Sixth Circuit have refused to

apply the rulings of this Court in *Parham* v, *J. R.*, 442 U.S. 524, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979) and *Secretary of Public Welfare* v, *Institutionalized Juveniles*, 442 U.S. 640, 99 S.Ct. 2523, 61 L.Ed.2d 142 (1979) to the admission of adults to residential facilities for mental retardation. CHR respectfully requests the Court to extend these previous rulings to the situation presented in the case at bar for the benefit of the mentally retarded, their families, and the state administrators who are charged with the responsibility of administering programs for the mentally retarded.

In *Parham*, this Court provided an approach for testing challenged state procedures under a Due Process claim which required the balancing of (a) the private interest that will be affected by the official action; (b) the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (c) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. 442 U. S. at 599-600.

A. The following factors must be balanced under *Parham*.

(1) Private Interests.

The private interests affected by state action in the case at bar are very similar to those described in *Parham* at 442 U. S. 600. The first of these interests is the interest of a mentally retarded adult to specialized type of care called habilitation. *Philadelphia Police and Fire Assoc. for Handicapped Children, Inc.* v, *City of Philadelphia*, 874 F.2d 156 (3rd. Cir. 1989) described this care as:

> The mentally retarded require special and continuing care called "habilitation" to function optimally in

> society. Habilitation entails "teaching and training the retarded basic life and social skills" such as walking, talking, eating, toileting, socializing, using money, traveling and working. Those lessons, however, are not learned permanently by mentally retarded persons: once habilitation ceases, they begin to regress. *Id.* at 158.

Adults suffering from severe and profound mental retardation who function in society at the level of young children have the same interests in being cared for as do children. Mentally retarded adults also have a liberty interest in not being unnecessarily restricted by the provision of habilitation services.

Parents and legal guardians of the mentally retarded have important interests at stake. Since ninety-seven or ninety-eight percent of the retarded reside in the community outside of an institutional setting, (R. 34, p. 28), the role of care-giver and care-provider for the retarded has traditionally fallen upon the mentally retarded person's parents or immediate family. Such care was demonstrated by *amicus* below.[5]

The role of the family continues after a mentally retarded adult leaves his home for some type of community placement. Family members are virtually the only constant figures in the mentally retarded person's life and only a family has a broad enough perspective to take in the total picture of service needs. Blacker, J., et al., *Toward Meaningful Family Involvement in Out-of-Home Placement Settings,* Mental Retardation, Vol. 30, No. 1, 35-43 (1992).

A legal guardian of a mentally retarded person assumes statutory duties to provide for his ward's care, comfort and maintenance and to arrange for such educational, social, vocational and rehabilitation services as will assist the ward in the development of maximum self-reliance and independence. KRS 387.660(2). The guardian is required to report to the state district court concerning his ward and his activities as guardian. KRS 387.670(3). The role of legal guardian often falls upon the mentally retarded person's parents, and these legal duties supplement the parent's traditional high moral duties.

(2) Procedures utilized.

Under *Parham*, the risk of deprivation of the foregoing interests through the procedures used, as well as the probable value of any additional or substitute procedures must be weighed in the balancing process. The procedures utilized in CHR's voluntary admission process were set forth in the Statement of the Case. However, since CHR's voluntary admission procedure could only be instituted by a legal guardian, the Court must also examine the procedures used in the appointment of a guardian.

The appointment of guardians for disabled persons in Kentucky is governed by KRS 387.500, *et seq.* The appointment process requires that a petition be filed in the state district court of the county in which the respondent resides. KRS 387.520. An attorney is appointed to represent the respondent. KRS 387.560. Prior to any hearing, a court-appointed interdisciplinary evaluation team composed of a physician, psychologist and social worker prepare a comprehensive evaluation of the respondent for the court. KRS 387.540.

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[5] *See also:* Buchan, L., et al., *Working with families of children with special needs: The parent adviser scheme.* Child Care, Health and Development, March-April Vol. 14(2), 81-91 (1988); Castellani, P. J., et al., *Availability and accessibility of family support services.* Mental Retardation, Vol. 24(2), 71-79 (1986); Davidson, P., et al., *Planning and implementing comprehensive crisis intervention for people with developmental disabilities,* in J. Levy, P. Levy and B. Nevin (Eds), Strengthening Families: New Directions in Providing Services to People with Developmental Disabilities and Their Families. N.Y.: YAI Press, 203-210.

The respondent has a right to a jury trial at which the respondent may present evidence and confront all witnesses. KRS 387.570. The burden of proving that the respondent is disabled in managing his personal affairs and financial resources rests upon the Commonwealth and the evidence must satisfy the "clear and convincing" standard. KRS 387.570.

At the conclusion of the proof, the jury retires to determine whether the respondent is disabled, partially disabled or not disabled in relation to the management of his personal affairs and in relation to the management of his financial affairs. KRS 387.580. Upon a finding of disability, the district court may appoint a general guardian or a limited guardian whose power is limited to the extent of the respondent's disability. KRS 387.590.

A guardianship proceeding is not a *pro forma* matter. The hearings are adversarial in nature and pit the parent seeking a judicial declaration of mental disability against his child and the child's appointed counsel. (R. 213, pp. 30-33).

After a judicial determination is made regarding guardianship, the procedure for admission to one of CHR's ICF/MR's follows the medical model previously described herein. The application and accompanying material describing the previous efforts to provide habilitative services within the home and community are reviewed by professionals within CHR who are familiar with mental retardation and the services available at CHR's facilities. These

qualified professionals make the determination whether to permit the mentally retarded person to be admitted to an ICF/MR.

After admission to an ICF/MR, the facility staff responsible for treatment are under a continuing duty to evaluate the mentally retarded person's condition to determine whether continued residential placement is necessary. (R. 36, p. 30). The staff conduct resident reviews on a monthly and quarterly basis and hold interdisciplinary team staffings for each resident annually to assess each individual's need for continued residential placement. (R. 36, p. 30). The staff may be subject to civil liability under 42 U.S.C. § 1983 for continuing to retain a resident once a less restrictive setting becomes appropriate. *See Clark* v, *Cohen*, 613 F.Supp. 684 (M.D. Pa. 1985), aff'd 794 F.2d 79 (3rd Cir. 1986), *cert den.*, 107 S.Ct. 459 (1986).

(3) Interests of the Commonwealth of Kentucky.

Kentucky, like all States, as an undeniable *parens patriae* interest in providing necessary habilitation services to the mentally retarded. These services are expensive and compete for funding with other worthwhile services in an austere state budget. Kentucky, like all States, has invested substantial state and federal funds in the construction of facilities, employment of professional personnel, purchase of equipment and the development of programs to provide needed and beneficial habilitative services to the mentally retarded. Thus, Kentucky has a genuine interest in the allocation of priority to the diagnosis of mental retardation and provision of necessary habilitation services rather than the provision of additional procedures before its administration of such services. *See Parham* v, *J. R.*, 442 U. S. at 605.

The time and expense of having physicians, psychologists, occupational therapists, social workers and other mental retardation professionals prepare for and appear in the courtroom in every case involving CHR's provision of habilitation services to the mentally retarded directly distracts from the provision of habilitation services and is of little, if any, benefit to those who seek such services through CHR's ICF/MR facilities.

Kentucky also has a financial interest in the allocation of its scare judicial resources, including prosecutorial resources and the public's payment of fees for counsel and expert witnesses for indigent respondents in involuntary hospitalization proceedings.

B. Balancing the *Parham* factors.

Like the situation presented in *Parham* v, *J. R.*, the questions presented when a guardian finds it necessary to seek habilitation services for his mentally retarded ward through one of CHR's ICF/MR facilities are essentially, if not overwhelmingly, medical in character. The issues are whether the ward is mentally retarded and whether he can benefit from the available habilitation services which CHR can provide. *See* 442 U. S. at 609.

The supposed protections of an adversary judicial proceeding to determine the appropriateness of such medical decisions for the provision of habilitation services on an inpatient basis may be more illusory than real. 442 U. S. at 609. There is no reason to believe that lay jurors are more adept in answering these medical questions than trained medical and mental retardation professionals, or that the former can reach an informed decision on these questions more economically than the latter. *See* 442 U. S. at 612.

Moreover, repeated adversarial proceedings pitting the ward against his guardian and parent can be detrimental to both parties. *See* 442 U. S. 610; (R. 231, pp. 30-33; 37-40). Parents of the mentally retarded understandably often feel guilty because they are not physically and psychologically equipped to provide for their child's medical and habilitative needs - needs which generally increase as the mentally retarded child grows older and the parents' abilities diminish. (R. 213, pp. 41-42).

The barriers imposed by the decisions below to guardians and parents seeking necessary habilitative treatment and services for their wards and children unnecessarily prevent mentally retarded persons from receiving needed services in a timely and cost-effective fashion and may prevent them from receiving such services at all. These barriers may also strain unnecessarily the most important and permanent relationship the mentally retarded will ever know.

The courts below distinguished this case from *Parham* on the ground that the Doe class members have reached the age of majority and are not subject to the same degree of parental control present in *Parham* and *Institutionalized Juveniles*. CHR respectfully submits that the interest of parents in the health and welfare of their mentally retarded children does not cease when these children become chronological adults. When that natural parental interest is supplemented by the mandatory duties of a legal guardian, the interests of the parent/guardian are greater than that presented by the parents in *Parham* and *Institutionalized Juveniles*. Moreover, *Parham* held that the interests and duties of a legal guardian alone were sufficient to tilt the balancing of interests toward the medical model. 442 U. S. at 618-620.

CHR respectfully submits that a proper balancing of the interests involved in this litigation weighs heavily in favor of permitting the legal guardian of a mentally retarded adult to substitute his consent for that of his ward to the ward's voluntary admission to a CHR operated ICF/MR for necessary habilitation services provided such admission is determined necessary and beneficial for the ward by trained medical professionals.

2. Kentucky's utilization of the "clear and convincing" standard of evidence for the involuntary hospitalization of the mentally retarded and the "beyond a reasonable doubt" standard for involuntary hospitalization of the mentally ill does not violate Equal Protection.

Although *Addington* v, *Texas*, 441 U. S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979) holds that the "clear and convincing" standard of evidence is required by the Fourteenth Amendment in civil proceedings to involuntarily commit an individual to a state mental hospital for an indeterminate period of time, the Kentucky General Assembly adopted the "beyond a reasonable doubt" standard of evidence for such proceedings in Kentucky. KRS 202A.076(2).

Prior to the adoption of 1990 Kentucky Acts, Chapter 147 (House Bill 511), KRS 202B.050 incorporated by reference the involuntary hospitalization proceedings described in KRS Chapter 202A for involuntary hospitalization proceedings for the mentally retarded, including the "beyond a reasonable doubt" standard of evidence.

The 1990 General Assembly made massive revisions in KRS Chapter 202B which included adoption of specified judicial involuntary hospitalization procedures predicated upon the "clear and convincing" standard of evidence. Section 15(2) of House Bill 511. An effort was made by the General Assembly to amend the standard of evidence for involuntary hospitalization procedures for the mentally ill; however, that legislation did not become law.

As a result of the 1990 legislation, Kentucky now has different standards of evidence for the involuntary hospitalization of the mentally retarded and the mentally ill which the courts below found to be in violation of Equal Protection.

The Equal Protection Clause of the Fourteenth Amendment prohibits a State from denying any person within its jurisdiction the "equal protection" of the law. This prohibition is essentially a direction that all persons similarly situated should be treated alike. *City of Cleburne* v, *Cleburne Living Center*, 473 U.S. 432, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985). The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statue is rationally related to a legitimate state interest. *Cleburne*, 473 U. S. at 440.

Mental retardation is a condition that the government may legitimately take into account in a wide range of decisions. *Cleburne*, 473 U. S. at 446. Legislation which distinguishes between the mentally retarded and others is permissible provided the legislation is rationally related to a legitimate government purpose. *Ibid.*

A. The state's previous adoption of an unreasonable standard of evidence for involuntary hospitalization of the mentally ill should not now prejudice the mentally retarded.

In *Addington* v, *Texas*, supra, this Court did more than simply set the "clear and convincing" standard of evidence as the constitutionally permissible floor for involuntary hospitalization, it also determined that the "clear and convincing" standard was the correct standard. Indeed, the Court concluded that the "beyond a reasonable doubt" standard was "inappropriate" in civil commitment proceedings. 441 U. S. at 417. This Court found the criminal law standard to be inappropriate because it was likely to impose a burden the state could not meet and thereby erect an unreasonable barrier to needed medical treatment. 441 at U. S. 417. *Addington* acknowledged that some states, including Kentucky, had already adopted the criminal law standard for involuntary hospitalization proceedings and expressed doubt as to whether this standard could be adapted to the needs of the states. 441 U. S. 417-418.

Given that Kentucky has improvidently applied an inappropriate standard of evidence that unreasonably prevents the mentally ill from receiving necessary medical treatment, there is no sound reason to compound that mistake by applying the same inappropriate standard of evidence to the provision of necessary habilitation services to the mentally retarded.

The difference in the standards of evidence imposes no burden upon the mentally retarded. Rather, it simply frees them from a burden which was imposed unnecessarily, and perhaps unwisely, upon the mentally ill.

B. Sufficient differences exist between the mentally retarded and the mentally ill to constitutionally permit the State to utilize the "clear and convincing" standard of evidence for involuntary hospitalization of the mentally retarded while utilizing the "beyond a reasonable doubt" standard for involuntary hospitalization of the mentally ill.

In *Kremens* v. *Bartley*, 431 U. S. 119, 97 S.Ct. 1709, 54 L.Ed.2d 184 (1977), this Court suggested that there are significant differences between the mentally ill and the mentally retarded that are clearly relevant for purposes of reviewing procedures by which they are admitted to state facilities. The issue sought to be addressed in *Kremens* involved the procedures by which a State admitted 13-18 year olds to its mental health facilities. During the pendency of the litigation, the State repealed the statutes upon which the claims had been based except as those statutes applied to the mentally retarded and children under age 13. This Court held that the claims of the named class representatives were moot and remanded the action for further proceedings with the instruction to the District Court that "careful attention must be paid to the differences between the mentally ill and the mentally retarded" 431 U. S. at 135-136.

CHR has attempted to demonstrate throughout this litigation that there are significant differences between the mentally ill and the mentally retarded which provide a rational basis for the General Assembly's adoption of different standards of evidence for their involuntary hospitalization.

Mental retardation is a permanent condition — it cannot be cured or treated. (R. 69, pp. 29-30). Persons suffering from mental retardation are in need of special and continuing care called habilitation their entire lives.

Mental illness, unlike mental retardation, can be and usually is successfully treated with modern medications. Most mentally ill persons lead productive lives in society with the symptoms of their illness controlled or suppressed through medication.

Involuntary confinement to a state mental hospital has been found to engender adverse social consequences to the committed individual. *Addington*, 441 U.S. at 425-426.

Involuntary psychiatric treatment and mandatory behavior modification treatment can have a stigmatizing effect. *Vitek* v, *Jones*, 445 U. S. 480, 495, 100 S.Ct. 1254, 1265, 63 L.Ed.2d 552 (1980).

There has been no showing at any point in these proceedings of any stigma or other adverse social consequence associated with admission of a mentally retarded person to one of CHR's ICF/MR facilities. CHR's facilities bear little resemblance to mental hospitals. Given the nature of mental retardation, adverse social consequences are more likely to occur if the mentally retarded person fails to receive adequate habilitation services at necessary intervals.

Involuntary hospitalization of the mentally ill is an unplanned sporadic occurrence which removes an individual from society, brings his illness under control through appropriate diagnosis and administration of psychotropic medications which alter the patient's thought process, and then permits the patient to return back to society.

A mentally retarded person's need for habilitation services is not sporadic and need not be unplanned. Mental retardation is not subject to the same subtleties in diagnosis as mental illness and rarely involves treatment through psychotropic medications.

CHR respectfully submits that the differences between the mentally retarded and the mentally ill described above provide a rational basis for Kentucky's adoption of different standards of evidence for their involuntary hospitalization.

3. Involuntary hospitalization procedures which permit a mentally retarded person's immediate family or legal guardian to participate in the proceedings as though a party therein do not deprive the mentally retarded person to his right to Due Process of Law.

House Bill 511 contains certain sections that permit a mentally retarded person's legal guardian or immediate family member to participate in the involuntary commitment process as if he or she were a party to the proceeding.

Section 13 provides that the respondent in an involuntary commitment proceeding, or his parents or guardian, may employ a qualified expert witness whose testimony and findings shall be admissible at the hearing:

> A qualified mental retardation professional retained by the respondent, or the respondent's parent or guardian, at the expense of the parent or guardian, shall be permitted to witness and participate in any examination of the respondent and may submit findings, if any, to the Court. KRS 202B.140.

Section 15(3) permits the respondent's legal guardian and immediate family members to participate in the proceedings in all respects as parties:

> Guardians and immediate family members of the respondent shall be allowed to attend all hearings, conferences or similar proceedings; may be represented by private counsel, if desired; may participate in the hearings or conferences as if a party to the proceedings; may cross-examine witnesses if desired; and shall have standing to appeal any adverse decision. KRS 202B.160(3).

Section 22 describes the process for appeal from decisions made in involuntary commitment proceedings and also provides that the respondent's guardian may take an appeal:

> Appeals from the final orders or judgments of the District Court made and entered in proceedings under this chapter shall be taken in the manner as other appeals from District Court to Circuit Court. Appeals

> may be taken by the Commonwealth, the individual who is subject to the proceedings or the individual's guardian, limited guardian, or other authorized representative. This appeal shall be advanced on the Circuit Court docket without motion or notice. KRS 202B.230.

The District Court and the Sixth Circuit held that Sections 13, 15(3) and 22 of the Act violated Due Process because these Sections imposed an undue burden upon the mentally retarded by permitting "third parties" to participate in the commitment proceedings. CHR respectfully submits that the legal guardians and immediate family of a mentally retarded person are not "third parties" to an involuntary commitment proceeding and their participation in these proceedings does not impose an undue burden upon the retarded.

Since mental retardation is a permanent condition, reaching the age of majority does not mean emancipation for the mentally retarded person. He or she will remain dependent upon others for the balance of his or her life. The degree of dependence will depend upon the degree of retardation and the availability of continuous habilitation services.

As described previously herein, the role of care-giver or care-provider has traditionally fallen upon the mentally retarded person's parents or immediate family. When no parent or family member is willing or available, that role may be filled by a court-appointed guardian who is charged with the statutory duty of determining his ward's care, comfort, maintenance and arrangements for such educational, social, vocational and rehabilitation services as will assist the ward in developing maximum self-reliance and independence. KRS 387.660. The situation of Tracy Horton provides a fair example.

Tracy Horton was born on April 27, 1965. (R. 213, p. 8). Tracy was diagnosed as being profoundly retarded and having cerebral palsy at one year of age. (R. 213, p. 10). Tracy has never been able to speak or communicate with her parents and they do not know whether she has the ability to hear. (R. 213, p. 9). Despite Tracy's physical and mental limitations, Tracy's parents accepted her "as a special package of joy that we were going to raise as best we could." (R. 213, p. 10).

When she was a small child, Tracy could pull herself to a standing position at the coffee table, but as she grew older she lost the ability to stand at all. (R. 213, pp. 7-8). Tracy's parents and their neighbors and friends gave Tracy a type of physical therapy known as "patterning" for hours at a time to help Tracy learn to walk, but no change in her condition was noted after years of effort. (R. 213, pp. 12-13).

Tracy's parents kept her enrolled in the day programs available for retarded children so that she might be stimulated by the exercise and social aspects of these programs. (R. 213, pp. 14-15).

Tracy has no self-help skills at all. When Tracy lived at home, her parents got her up in the morning, diapered her, cleaned her, fed her breakfast one spoonful at a time, dressed her, and strapped her into her wheelchair to wait for the school bus. (R. 213, p. 16). If there was no school, her mother would feed her, change her diapers, talk to her and let her watch television. (R. 213, p. 17).

Tracy's major health problem was frequent bouts of pneumonia. (R. 213, p. 18). Tracy had bedsores for years which began to worsen severely as she neared twenty-one years of age. (R. 213, p. 20). Her frequent cough became more croupy and her limbs began to swell. Tracy's doctors described her condition as congestive heart failure. (R. 213, p. 21).

Tracy's father, Thomas Horton, is the administrator of the Episcopal Church Home in Louisville, Kentucky. (R. 213, p. 7). Despite 25 years of experience in long-term health care, Tracy's parents realized that they could not continue to provide for Tracy's needs at home. (R. 213, pp. 7 and 22). Tracy was enrolled in a structured day program, being treated by a doctor and cared for around the clock by family, but her condition was continuing to deteriorate. (R. 213, pp. 21-22). After consultation with the local comprehensive care center, Tracy's parents began the process of obtaining her admission to Hazelwood ICF-MR. (R. 213, pp. 27-28).

Tracy's parents instituted guardianship proceedings to obtain the power to voluntarily admit their daughter to Hazelwood. These proceedings led to the appointment of Tracy's mother as her legal guardian. (R. 213, pp. 31-33). After the District Court's initial preliminary injunction below, Tracy's parents were also required to institute involuntary commitment proceedings against Tracy to obtain her admission to Hazelwood. (R. 213, pp. 37-38).

If these judicial proceedings had resulted in a determination that Tracy did not meet the criteria for admission to Hazelwood[6], it was Tracy's parents — not CHR, Secretary Heller, Tracy's appointed counsel, the Jefferson District Court, the U. S. District Court Judge, Samuel Doe or his attorneys — who would have faced the very real and immediate crisis of meeting Tracy's health and habilitation needs. Tracy's parents were not "third parties" to the

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[6] The initial state court involuntary hospitalization proceedings resulted in Tracy's commitment to Hazelwood ICF/MR. (R. 213, p. 39). However, a subsequent jury trial resulted in a determination that Tracy no longer satisfied the criteria for involuntary admission to an ICF/MR. (R. 213, p. 53). The Secretary's refusal to forcibly remove Tracy from Hazelwood following this jury determination and the dismissal, for lack of standing, of her guardian's appeal prompted Doe's motion to hold the Secretary of CHR in contempt below. (R. 167). The motion for contempt was overruled. (R. 178).

commitment proceeding, their interests were every bit as legitimate as the Commonwealth's.

House Bill 511 gives the parents or guardian of a mentally retarded person the opportunity to make certain that all permissible, relevant and available evidence bearing upon the issue of whether his child or ward will be involuntarily compelled to receive necessary habilitation services at one of CHR's ICF/MR facilities is submitted to the independent decision-maker and to seek review of any decision which is not consistent with that evidence. Participation of the mentally retarded person's parents or guardian does not impact upon any of the procedures required by the Sixth Circuit in *Doe* v. *Austin*, 848 F.2d 1386 at 1393-1394 (6th Cir. 1988).

This Court has previously recognized the rights of parents and legal guardians to participate in proceedings involving the welfare of their children and wards. *See In Re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). CHR respectfully submits that the participation of immediate family members and legal guardians of the mentally retarded in proceedings for compelling involuntary provision of habilitative services does not offend Due Process.

4. Sufficient differences exist between the mentally retarded and the mentally ill to constitutionally permit a State to adopt procedures which permit the immediate family and legal guardians of mentally retarded persons to participate in involuntary hospitalization proceedings for the mentally retarded as if parties thereto without adopting procedures for the immediate family and legal guardians of mentally ill persons to participate as parties in involuntary hospitalization proceedings for the mentally ill.

The courts below found that permitting other interested parties to participate in the involuntary commitment proceedings for the mentally retarded imposed a burden on the mentally retarded that was not imposed upon the mentally ill. There has been no showing how increasing the likelihood that the independent decision-maker will receive all permissible, available and relevant evidence before deciding whether a mentally retarded person can participate in the Cabinet's habilitation programs imposes a burden upon the retarded. If anything, it would appear that the mentally retarded enjoy an advantage of the increased likelihood that the decision regarding their care needs will be based upon the appropriate evidence.

To the extent the additional protections provided to the mentally retarded by permitting other interested parties to participate in their commitment proceedings do cause the mentally retarded to suffer a burden, CHR respectfully submits that the differences between the mentally retarded and the mentally ill set forth in the previous argument provide a rational basis for the different treatment.

CONCLUSION

For the reasons set forth herein, the Opinions of the Court of Appeals which unnecessarily burden the mentally retarded, their families, legal guardians, and the State agencies attempting to provide the retarded with necessary beneficial habilitation services should be reversed.

Respectfully submitted,

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APPENDIX

KENTUCKY REVISED STATUTES

202B.010. Definitions. — As used in this chapter, unless the context otherwise requires:

(1) "Interdisciplinary team" means the group of persons responsible for the diagnosis, evaluation and individualized program planning and service implementation for the resident. The team is composed of a physician, a psychologist, a registered nurse, a social worker and other professionals, at least one (1) of whom is a qualified mental health professional, and may include the resident, the resident's family, or the guardian;

(2) "Mentally retarded person" means a person with significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period;

(3) "Mental retardation residential treatment center" means a residential treatment facility approved by the department for the evaluation, care and treatment of mentally retarded persons;

(4) "Qualified mental retardation professional" means:

(a) A psychologist licensed under the provisions of KRS Chapter 319, who has either one (1) year of specialized training for work with mentally retarded persons or one (1) year of clinical experience with mentally retarded persons;

(b) A licensed registered nurse with a master's degree in psychiatric nursing from an accredited institution, with two (2) years of clinical experience. At least one (1) year of such experience shall be with mentally retarded persons, or he shall have one (1) year of specialized training for work with mentally retarded persons;

(c) A certified social worker licensed under the provisions of KRS Chapter 335 or accredited by the academy of certified social workers, with two (2) years of clinical experience. At least one (1) year of such experience shall be with mentally retarded persons, or he shall have one (1) year of specialized training for work with mentally retarded persons;

(d) A psychologist with a master's degree from an accredited institution who has been awarded a certificate of qualification by the Kentucky board of examiners of psychologists under the provisions of KRS Chapter 319, with two (2) years of clinical experience. At least one (1) year of such experience shall be with mentally retarded persons, or he shall have one (1) year of specialized training for work with mentally retarded persons; and

(e) Other professional persons with similar training and experience who are qualified according to regulations promulgated by the secretary to participate in seventy-two (72) hour involuntary hospitalization procedures under this chapter;

(5) "Resident" means a person under care or treatment in a mental retardation residential treatment center pursuant to the provisions of this chapter; and

(6) All terms defined in KRS Chapter 202A shall have the same meaning when used in this chapter. (Enact. Acts 1976, ch. 328, § 2; 1986, ch. 79, § 1, effective March 6, 1986.)

202B.020. Hospitalization for mentally retarded — Court examination. — Hospitalization for the care and treatment of mentally retarded persons shall be provided by the same procedures as hospitalization of mentally ill persons as provided in KRS Chapters 387 and 210 and as set forth in KRS 202A.021, 202A.231 and 202A.201, except that:

(1) When the court appoints qualified persons to examine an allegedly mentally retarded respondent such persons shall, where possible, have made a special study of mental retardation;

(2) A qualified mental retardation professional may be substituted for one but not both physicians when certification is required for involuntary hospitalization under this chapter; and

(3) All functions of a hospital as set forth in KRS Chapter 202A may be carried out by a mental retardation residential treatment center. (Enact. Acts 1976, ch. 328, § 3; 1982, ch. 141, § 36, effective July 1, 1982; 1982, ch. 445, § 36, effective July 1, 1982.)

202B.030. Involuntary hospitalization. — When mentally retarded individuals are involuntarily hospitalized under this chapter, the cabinet may place them in a mental retardation residential treatment center. No mentally retarded person may be involuntarily placed in a hospital without the consent of the secretary, except when the determination of concurrent mental illness is made under the provisions of KRS chapter 202A. No mentally retarded person or juvenile may be involuntarily admitted to a hospital or mental retardation residential treatment center when the cabinet determines that appropriate programs and space are not available. (Enact. Acts 1976, ch. 328, § 4.)

202B.040. Involuntary commitment of alleged mentally retarded person — Required determination — When application not considered involuntary commitment. — When a person who is alleged to be mentally retarded is involuntarily committed, there shall be a determination that:

(1) He is a mentally retarded person;

(2) He presents a danger or a threat of danger to self or others;

(3) The least restrictive alternative mode of treatment requires placement in a hospital or mental retardation residential treatment center;

(4) Treatment that can reasonably benefit the individual is available in the hospital or mental retardation residential treatment center; and

(5) The application by parents or guardians for placement for their retarded family member or ward in any mental retardation treatment center shall not be considered an involuntary commitment under this section provided the retarded family member's application has been evaluated by an interdisciplinary team as defined in KRS 202B.010 and the subsequent admission fully complies with the provisions of KRS Chapter 202B. (Enact. Acts 1976, ch. 328, § 5; 1982, ch. 445, § 37, effective July 1, 1982; 1986, ch. 79, § 2, effective March 6, 1986.)

202B.045. Requirements for admission — Discharge planning. — (1) Admission:

(a) Patients shall be admitted only upon the approval of a physician. The facility shall admit only persons who have a physical or mental condition which requires developmental nursing services and a planned program of active treatment;

(b) The interdisciplinary team shall"

1. Conduct a comprehensive evaluation of the individual, not more than three (3) months before admission, covering physical, emotional, social, and cognitive facts; and

2. Prior to admission define the need for service without regard to availability of those services. The team shall review all available and applicable programs of care, treatment, and training and record its findings;

(c) If admission is not the best plan but the individual must be admitted nevertheless, the facility shall clearly acknowledge that the admission is inappropriate and initiate plans to actively explore alternatives;

(d) Before admission, the resident and a responsible member of his family or committee shall be informed in writing of the established policies of the facility and fees, reimbursement, visitation rights during serious illness, visiting hours, type of diets offered and services offered; and

(e) The facility shall provide and maintain a system for identifying each resident's personal property and facilities for safekeeping of his declared valuables. Each resident's clothing and other property shall be reserved for his own use.

(2) Discharge planning. Prior to discharge the facility shall have a postinstitutional plan which identifies the residential setting and support services which would enable the resident to live in a less restrictive alternative to the current setting. Before a resident is released, the facility shall:

(a) Offer counseling to parents or guardians who request the release of a resident concerning the advantages and disadvantages of the release;

(b) Plan for release of the resident, to assure that appropriate services are available in the resident's new environment, including protective supervision and other followup services; and

(c) Prepare and place in the resident's record a summary of findings, progress, and plans. (Enact. Acts 1986, ch. 79, § 4, effective March 6, 1986.)

202B.050. Rights guaranteed. — All rights guaranteed by KRS Chapters 202A (other than those rights enumerated in KRS 202A.026 and 202A.051) and Chapter 210 to mentally ill persons shall apply to mentally retarded persons. (Enact. Acts 1976, ch. 328, § 6; 1982, ch. 141, § 37, effective July 1, 1982; 1986, ch. 79, § 3, effective March 6, 1986.)

202B.060. Rights of mentally retarded — Secretary to adopt regulations. — The secretary shall adopt rules and regulations for the proper administration and enforcement of this chapter. Such rules and regulations shall include but shall not be limited to:

(1) Rights of mentally retarded residents and their families to be adequately informed as to the individual treatment program of the resident;

(2) Rights of residents and their families to assist in the planning of the treatment program of the resident;

(3) Rights of residents and their families under certain conditions to refuse treatment offered to the resident by the hospital or mental retardation residential treatment center;

(4) Rights of residents to maintain, keep and use personal possessions and money;

(5) Rights of residents to meet with friends and relatives;

(6) Rights of residents to receive payment for work performed on behalf of the hospital or mental retardation residential treatment center;

(7) Rights of residents to refuse intrusive treatments, including electroshock or psychosurgery;

(8) Rights of residents to seek relief from participating in their treatment plans;

(9) Rights of residents who are minors to seek relief from actions, approved by their parents or guardians, for or against admission and discharge;

(10) The use of seclusion and other mechanical restraints in hospitals and mental retardation residential treatment centers;

(11) The transfer of residents between hospitals and mental retardation residential treatment centers and between mental retardation residential treatment centers and forensic psychiatric facilities;

(12) The release of residents to less restrictive alternative modes of treatment on convalescent status; and

(13) Provisions for alternative methods for involuntary hospitalization. (Enact. Acts 1976, ch. 328, § 7.)

387.660. Specific powers and duties of guardian. — A guardian of a disabled person shall have the following powers and duties, except as modified by order of the court:

(1) To take custody of the ward and to establish his place of abode within the state, except that, it at any time a guardian places a ward in a licensed residential facility for developmentally disabled persons, the guardian shall, within thirty (30) days of such placement, file with the court notice of the placement, stating with specificity the reasons for such placement, and an interdisciplinary evaluation report detailing the social, psychological, medical or other considerations on which such placement is predicated, a description of the treatment or habilitation programs which will benefit the ward as a result of such placement, and a determination that such placement will provide appropriate treatment in the least restrictive available treatment and residential program. For purposes of this subsection, the interdisciplinary evaluation report may be one performed within two (2) months prior to the placement for purposes of determining whether such placement is necessary and appropriate, or may be an evaluation and assessment provided by the residential facility immediately after placement. Notice to the court shall not be

required where the ward is transferred from one licensed residential facility to another.

(2) To make provision for the ward's care, comfort, and maintenance and arrange for such educational, social, vocational, and rehabilitation services as are appropriate and as will assist the ward in the development of maximum self-reliance and independence.

(3) To give any necessary consent or approval to enable the ward to receive medical or other professional care, counsel, treatment or service, except that a guardian may not consent on behalf of a ward to an abortion, sterilization, psychosurgery, removal of a bodily organ, or amputation of a limb unless the procedure is first approved by order of the court os is necessary, in an emergency situation, to preserve the life or prevent serious impairment of the physical health of the ward.

(4) To act with respect to the ward in a manner which limits the deprivation of civil rights and restricts his personal freedom only to the extent necessary to provide needed care and services to him.

(5) To expend sums from the financial resources of the ward reasonable and necessary to carry out the powers and duties assigned to him by the court and, unless a separate conservator has been appointed, to manage the financial resources of this ward.

If a separate limited conservator or conservator has been appointed for the ward, the expenditure of funds by the limited guardian shall be consistent with the duties assigned to and procedures and policies established by such limited conservator or conservator. Conflicts arising between a limited guardian and a limited conservator or conservator regarding the expenditure of funds which are unable to be otherwise resolved shall be submitted to the court for resolution. (Enact. Acts 1982, ch. 141, § 17, effective July 1, 1982.)

387.670. Annual report of guardian. — (1) A guardian shall file with the court as least annually a verified report stating:

(a) The ward's current mental, physical, and social condition;

(b) The address of every residence of the ward during the reporting period and length of stay at each residence;

(c) A summary of the medical, social, educational, vocational, and other professional services received by the ward during the reporting period;

(d) An outline of the guardian's visits with and activities on behalf of the ward;

(e) A recommendation as to the need for continued guardianship;

(f) A statement signed by the standby guardian, if one has been appointed, that the standby guardian continues to be willing to serve in the event of the death, resignation, removal, or incapacity of the guardian; and

(g) Other information requested by the court or useful in the opinion of the guardian.

(2) For the purpose of filing the report required by subsection (1) of this section, the guardian shall be given access to records pertaining to the ward held by public or private agencies which contain information necessary for the guardian to perform his duties.

(3) The court shall review the report required in subsection (1) of this section and take whatever action it considers necessary to enhance the well-being of the ward.

(4) In addition to the requirements of this section, a guardian shall comply with the reporting requirements of KRS 387.710 unless a separate conservator has been appointed. (Enact. Acts 1982, ch. 141, § 18, effective July 21, 1982.)

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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

◆

LEONARD E. HELLER, Secretary, KENTUCKY CABINET FOR HUMAN RESOURCES,

Petitioner,

v.

SAMUEL DOE, by his Mother and Next Friend, Mary Doe, et al.,

Respondents.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

◆

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. May Kentucky, consistent with the equal protection clause of the fourteenth amendment, involuntarily commit mentally retarded adults to state treatment facilities under a clear and convincing standard of proof, while requiring proof beyond a reasonable doubt for involuntary commitment of mentally ill adults?

2. May Kentucky, consistent with the equal protection clause of the fourteenth amendment, permit third persons to participate as if they were parties in the involuntary commitment of mentally retarded adults when they are not permitted to participate as if parties in the involuntary commitment of mentally ill adults?

3. May Kentucky, consistent with due process of law, permit third persons to participate as if they were parties in the involuntary commitment of mentally retarded adults?

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The respondent class of mentally retarded adults in Kentucky embraces persons of different skills and potentials. While many need a range of supportive services to live and participate in the life of the community, few require institutional care or should be subjected to the loss of liberty that results from institutionalization. Kentucky would lessen for mentally retarded adults the procedural safeguards against unwarranted confinement by treating them less favorably than mentally ill adults and by allowing third parties extraordinary and unwarranted control over the civil commitment process. The Court of Appeals for the Sixth Circuit properly found that there was no constitutional justification for doing so.

STATEMENT OF THE CASE

This is a civil rights action filed in 1982 by Samuel Doe and a class of mentally retarded adults to bring to a halt the institutionalization of mentally retarded adults under circumstances in violation of the United States Constitution. Respondents are persons who have been admitted or who face admission to an intermediate care facility for the mentally retarded (ICF/MR) operated by petitioner, Kentucky Cabinet for Human Resources (CHR). R.50: Defendant's Answer, ¶ 4.

In 1976, Kentucky enacted a statutory scheme governing involuntary civil commitment. Ky. Rev. Stat. Ann. (K.R.S.) Chapters 202A, "Kentucky Mental Health Hospitalization Act," and 202B, "Kentucky Mental Retardation Hospitalization Act." These provisions were themselves a response to a 1975 U. S. District Court decision insisting on adequate procedural protections for persons facing civil commitment.[1]

In an important respect, however, the 1976 law was a dead letter. Rather than provide the procedural safeguards required by law for the involuntary admission of mentally retarded adults, CHR, as a matter of policy, characterized as "voluntary" virtually every commitment to a state mental retardation facility, using an informal admissions process called the Record Review Committee. R.36: Turner depo., Exhibit 1 at 5, ¶ C.8 at 5.

With respect to this process, the U. S. District Court for the Western District of Kentucky found that:

> The record reveals that if the retarded person is unable to understand the procedures of admission, the procedure is explained to the family accompanying him. If the family agrees to it, and if the individual signs the application with an x or is able in any other way to let the defendants [CHR] know whether he or she wants to be admitted, then that individual is considered a voluntary admission.

---

[1] *Kendall v. True*, 391 F. Supp. 413 (W.D. Ky. 1975). Prior to *Kendall*, the involuntary commitment statutes reflected the theory that where an "individual is mentally ill and lacks the capacity to make a choice . . . he may then be civilly committed under the *parens patriae* doctrine." *Id.* at 417. However, the district court found that the *parens patriae* doctrine when used to uphold commitment statutes had fallen into disfavor with the courts. *Id.* For a mentally retarded person, the 1976 statute permitted involuntary commitment only upon a state district court determination that (1) he or she was mentally retarded, (2) he or she presented a danger or a threat of danger to self or others, and (3) the least restrictive alternative mode of treatment required placement in a residential facility. K.R.S. 202B.040.

> The record further reveals that no civil proceedings with regard to admissions have been instituted. The defendants consider this appropriate because they believe that nearly all admissions are voluntary rather than involuntary.

Joint Appendix (J.A.) at 65.[2]

In 1982, when this case was filed, the use of involuntary civil commitment proceedings in admitting mentally retarded persons to ICF/MRs in Kentucky was extremely rare.[3] Between 1982 and 1985 admission to an ICF/MR followed an involuntary commitment hearing on only *one* occasion. R.114: Defendant's Answers to Interrogatories at 2. The only use of the involuntary commitment procedure that Dr. Susan Turner could recall in late 1982 occurred when a mentally retarded individual wished to *leave* an ICF/MR and CHR employed the involuntary commitment procedure to prevent it. R.36: Turner depo.

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[2] Ms. Verna Fairchild, Director of CHR's Division for Institutional Care, testified regarding the Resident's Bill of Rights form. R.36: Turner depo., Exhibit 11. At the time of admission, this document may be signed by the mentally retarded person. R.35: Fairchild depo. at 14 and 42. Ms. Fairchild acknowledged that it was a state practice to consider all admissions voluntary, if the person signed the Bill of Rights form. *Id.* at 51.

[3] CHR admitted that prior to 1982 no severely or profoundly retarded person resided at Outwood as a result of a court order pursuant to K.R.S. 202A or 202B. R.29: Answers to Requests for Admission, ¶ 20. A CHR investigation at the direction of Deputy Commissioner Draper revealed "no involuntary admissions during this past calendar year [1982] to any of our MR facilities to the best of their knowledge . . . " R.37: Draper depo. at 12-13; *see also* pp. 16-17. He continued, "I think I'm correct in saying that I have the general impression that very few mentally retarded people would ever be committed involuntarily under the 202B concept to our ICF/MR facilities." *Id.* at 18.

at 27-28. By contrast, about 50 percent of admissions of mentally ill persons to state mental health facilities followed involuntary commitment procedures. R.37: Draper depo. at 21.

CHR also had a practice of permitting parents to veto a decision by an ICF/MR to seek community placement for their adult children in lieu of continued institutionalization, even when community placement was recommended by mental retardation professionals.[4] The U. S. District Court for the Western District of Kentucky ruled in respondents' favor in opinions dated March 28, 1984 and January 9, 1986. In the former opinion, the district court held that the practice of permitting parents to veto a decision by an ICF/MR to seek community placement for their adult children violated the adult children's due process rights. J.A. at 61.

In its opinion of January 9, 1986, the district court held that CHR had violated respondents' rights to equal protection by committing them without benefit of procedures guaranteed by K.R.S. 202A to the mentally ill. The court found that, of the approximately 800 persons then confined in Kentucky's four ICF/MRs, fully 100 were classified as only moderately or mildly retarded. J.A. at 64. However, the court held that, even with respect

to those classified as severely or profoundly retarded, their commitment could not be deemed voluntary as long as they were admitted on the application of someone else, including parents or guardians. *Id.* at 70. Accordingly, the court issued a preliminary injunction and granted partial summary judgment to respondents ordering CHR to do what Kentucky law required – that is, to admit severely and profoundly retarded persons to an ICF/MR only upon a judicial determination that such a commitment was appropriate. *Id.* at 73-74.

The 1986 Kentucky General Assembly responded swiftly, striking from K.R.S. 202B the section guaranteeing allegedly mentally retarded persons a judicial determination prior to commitment and adding a section defining as voluntary any commitment based on the application of a retarded person's parents or guardian. R.120: Plaintiffs' Motion for Preliminary Injunction, Appendix at 1-6.

Claiming that the new law was unconstitutional, respondents filed a motion for a preliminary injunction and/or partial summary judgment. On November 20, 1986, the district court held that (1) CHR's reliance on informal commitment procedures in lieu of the procedures formerly guaranteed by K.R.S. 202B violated respondents' due process and equal protection rights, *Doe v. Austin*, 668 F. Supp. 597, 600 (W.D. Ky. 1986), *aff'd in part, rev'd in part*, 848 F.2d 1386 (6th Cir.), *cert. denied*, 488 U.S. 967 (1988), J.A. at 83-84; (2) applications by parents or guardians for commitment of mentally retarded family members or wards were not "voluntary" commitments, *id.* at 84-85; (3) equal protection required a judicial hearing and determination prior to commitment, *id.* at 85-86;

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[4] R.34: Skarnulis depo. at 23-35, 55-56, 109-112, J.A. at 18-26, 29-30, 32-35; R.35: Fairchild depo. at 22-23, J.A. at 39-40; R.73: Middendorf depo. at 18-19, J.A. at 46-47; R.177: Mlinarcik depo. at 36, J.A. at 110; R.37: Draper depo. at 32, 68, J.A. at 40-41; *see also* R.37: Draper depo. at 36-37. CHR characterizes the parental veto right as a requirement of a federal Medicaid regulation, Pet. Br. at 11 n.3, but the record shows clearly that CHR's parental veto policy was a response to pressure from organized parent groups opposed to community placements for their adult children. R.37: Draper depo. at 40, 42.

and (4) due process required periodic review of any commitment decision. *Id.* at 87. The court ordered that there be no adult admission without a judicial determination that the criteria for involuntary admission were satisfied. *Id.* at 88-89. CHR appealed the preliminary injunction to the U. S. Court of Appeals for the Sixth Circuit.

On June 15, 1988, a panel of the court of appeals held unanimously that, while a judicial hearing was not required by the due process clause of the fourteenth amendment, it was required by the equal protection clause, since Kentucky granted such protections to mentally ill persons and failed to show any rational basis for distinguishing between mentally ill persons and mentally retarded persons on that issue. *Doe v. Austin*, 848 F.2d at 1394, J.A. at 106. The Sixth Circuit also held that, while a periodic judicial review was not required by due process, it was required by equal protection for committed mentally retarded adults, since Kentucky granted periodic judicial review to committed mentally ill adults and the court saw no legitimate state interest that would justify distinguishing between the two groups on that issue. *Id.* at 108-09. The court acknowledged that the two groups might be relevantly distinguished with respect to frequency of review and remanded that issue for consideration by the district court. *Id.* at 109 n.9. CHR's petition for a writ of certiorari was denied on November 28, 1988. *Cowherd v. Doe*, 488 U.S. 967 (1988).

A revision of K.R.S. 202B enacted by the 1990 Kentucky General Assembly again brought respondents before the court of appeals. This enactment came after the parties had submitted to the district court, on October 30, 1989, an agreed final compliance plan designed to implement the previous decisions of the Sixth Circuit and the

district court, but before the district court had acted on the plan. R.189A: Agreed Final Compliance Plan.[5]

While the agreed final compliance plan would have required Kentucky to give the same rights and procedures to adult mentally retarded persons with respect to commitment as the state gives to adult mentally ill persons, the 1990 enactment gutted those protections as far as mentally retarded persons were concerned, lowering the standard of proof required to institutionalize them and giving family members and others extraordinary influence over the commitment process.

On May 18, 1990, respondents challenged as unconstitutional various sections of the new legislation. R.201: Plaintiffs' Motion for Preliminary Injunction and/or Summary Judgment.[6] On July 1, 1991, the district court addressed four issues raised by plaintiffs, holding (1) that procedures established by the new law for voluntary admissions and for legal representation were constitutional, R.215: Memorandum Opinion at 6, 12, J.A. at 164, 168, but (2) that the failure to provide for release of voluntarily admitted adults at their own request was unconstitutional, *id.* at 165; (3) that allowing mentally retarded persons to be committed under a clear and convincing standard of proof was unconstitutional under the equal protection clause, *id.* at 167-168; and (4) that allowing third parties to participate in commitment proceedings "as if" they were parties violated respondents' due process and equal protection rights. *Id.* at 168. The court enjoined CHR from applying or enforcing any of the provisions found unconstitutional, *id.* at 169-170, and CHR appealed to the Sixth Circuit.

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[5] No number has been assigned this document. Since it appears on the district court docket continuation sheet between entries 189 and 190, respondents designate it R.189A.

[6] House Bill 511 (codified as K.R.S. 202B.021(2), .140, .160(2) and (3), .210, and .230).

On June 1, 1992, the Sixth Circuit held that "[t]he mentally ill and mentally retarded are identical insofar as they lose their personal liberty by involuntary institutionalization." *Doe v. Cowherd*, 965 F.2d 109, 113 (1992), J.A. at 177. Accordingly, the court of appeals ruled under the equal protection clause that, since Kentucky applies the reasonable doubt standard in committing mentally ill persons, the state must apply the same standard in committing mentally retarded persons. *Id.* The Sixth Circuit also affirmed the district court's holding that Kentucky's practice of allowing third persons to participate as if they were parties in the involuntary commitment proceeding of mentally retarded adults violates equal protection and due process. *Id.*

SUMMARY OF ARGUMENT

Respondents challenge sections of a Kentucky statute governing involuntary civil commitment of mentally retarded persons. A provision allowing persons alleged to be mentally retarded to be institutionalized on a clear and convincing standard of proof, while those alleged to be mentally ill may not be institutionalized except on proof beyond a reasonable doubt, violates equal protection. Allowing family members and other third parties to participate as parties in the commitment procedure for allegedly mentally retarded persons, while not allowing the same in the commitment of allegedly mentally ill persons, also violates equal protection. This is true whether this Court deems classifications based on alleged retardation worthy of rational basis or a higher level scrutiny.

Under rational basis analysis, the challenged classification is not rationally related to a legitimate state purpose, because it is based on alleged differences between mentally ill and mentally retarded persons that are inconsistent with the record evidence, not unlike the ordinance at issue in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1982), and because the commitment hearing is designed to determine the very fact that the state's classification prejudges – namely, whether an allegedly mentally retarded person is in fact so.

Because the challenged classification implicates an important and fundamental right – the right to be free from unwarranted confinement – this Court's decision in *Foucha v. Louisiana*, 112 S. Ct. 1780 (1992), suggests that the classification cannot withstand equal protection analysis unless the state justifies it with a particularly convincing reason. Mindful of the prerogatives of a co-equal branch of government, this Court should also take into account the intention of Congress, implicit in the findings which preface the Americans With Disabilities Act of 1990, that classifications burdening persons with disabilities be given the higher scrutiny reserved for discrete and insular minorities. The reasons advanced by the Commonwealth of Kentucky – to accelerate the institutionalization process, to save money, and to accommodate the wishes of family members – are not particularly convincing reasons and do not remotely represent a compelling state purpose.

Permitting individuals to participate in the commitment process, and to appeal decisions with which they disagree, who represent neither the state nor the person whose liberty is at stake, and whose interests may be, and frequently are, adverse to the interests of the person whose liberty is at stake, is a denial not only of equal protection but also of due process. It represents a burden on respondents which upsets the balance envisioned by this Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976), and severely undermines the protections guaranteed by *Vitek v. Jones*, 445 U.S. 480 (1980).

Finally, this Court should decline review of the question of whether a state may treat as voluntary the institutionalization of mentally retarded adults at the request of their legal guardians, since the issue was not among the questions presented in the petition for a writ of certiorari, is not fairly included among the questions that were presented, and is now raised by petitioner without any justification. In any event, treating such commitments as voluntary would violate both equal protection – in that it would, without justification, burden mentally retarded persons in a way not applicable to mentally ill persons – and due process. A state may not, consistent with due process, presume that the interests of legal guardians are coextensive with those of their adult wards, dispense with the procedural safeguards specified in *Vitek v. Jones* in the civil commitment of adults, or substitute for the civil commitment proceeding a guardianship proceeding which addresses none of the issues that the commitment proceeding is designed to adjudicate.

ARGUMENT

I. KENTUCKY STATE MAY NOT, CONSISTENT WITH EQUAL PROTECTION, DESIGNATE A LOWER STANDARD OF PROOF OR PERMIT PARTICIPATION OF THIRD PERSONS AS PARTIES IN CIVIL COMMITMENT PROCEDURES FOR MENTALLY RETARDED ADULTS WHEN MENTALLY ILL ADULTS FACING CIVIL COMMITMENT ARE NOT SO BURDENED.

Ky. Rev. Stat. Ann. (K.R.S.) Chapter 202A, the Kentucky Mental Health Hospitalization Act, establishes procedures for the involuntary institutionalization of mentally ill persons in state, federal, or state-approved facilities. K.R.S. 202A.011(5). K.R.S. Chapter 202B, the Kentucky Mental Retardation Admission Act, establishes procedures for the involuntary institutionalization of mentally retarded persons in like facilities. K.R.S. 202B.010(6). At issue in this case are four sections of K.R.S. 202B governing involuntary commitment of mentally retarded persons to an intermediate care facility approved by CHR for the evaluation, care, and treatment of mentally retarded persons. One section lists the procedural safeguards to be provided in the final hearing, providing that "[t]he manner of proceeding and the rules of evidence shall be the same as those in any criminal proceeding, *except that the standard of proof shall be by clear and convincing evidence.*" K.R.S. 202B.160(2), J.A. at 128 (emphasis added). The other three sections authorize participation by various third persons. A parent or guardian of the person facing commitment may hire a mental retardation professional to examine the person and submit findings to the court. K.R.S. 202B.140, J.A. at 127. Guardians and immediate family members may participate as if parties in all proceedings, may retain counsel, may cross-examine witnesses, and may appeal a decision they consider adverse. K.R.S. 202B.160(3), J.A. at 128. Appeals may be taken not only by the Commonwealth and the person facing commitment but also by the person's "guardian, limited guardian, or other authorized representative." K.R.S. 202B.230, J.A. at 132.

Kentucky provides a similar procedure for the involuntary institutionalization of mentally ill persons except that, in the commitment hearing, "[t]he manner of proceeding and rules of evidence shall be the same as those in any criminal proceeding including the burden of proof beyond a reasonable doubt." K.R.S. 202A.076(2). Moreover, the statute nowhere confers on third persons a right to participate as if parties or the right to appeal. In this regard, the statute is in accord with Kentucky case law providing that "when a proceeding may lead to the loss of personal liberty, the defendant in that proceeding should be afforded the same constitutional protection as is given to the accused in a criminal prosecution." *Denton v. Commonwealth*, 383 S.W.2d 681, 682 (Ky. App. 1964); *see also Messer v. Roney*, 772 S.W.2d 648 (Ky. App. 1989).

By lowering the standard of proof needed to justify commitment of allegedly mentally retarded persons, Kentucky has burdened respondents in a way the state does not burden allegedly mentally ill persons, even though the two groups are similarly situated in that they both face the threat of institutionalization. Petitioner acknowledges that, despite efforts to lower the standard of proof required for involuntary commitment of mentally ill persons, the 1990 Kentucky General Assembly declined to do so. Brief for Petitioner (Pet. Br.) at 28-29. The function of a standard of proof is to allocate the risk of error between

the litigants and to indicate the relative importance attached to the ultimate decision. *Addington v. Texas*, 441 U.S. 418, 423 (1979). Kentucky has, by insisting on the beyond-a-reasonable-doubt standard, indicated the importance it attaches, as a matter of policy, to the involuntary commitment of mentally ill persons. Equal protection requires that, absent a rational reason for disadvantaging respondents, mentally retarded persons should also benefit by that policy.

The same is true of Kentucky's decision to permit participation in the commitment process of third parties, and giving a right of appeal to those third parties, whose interests may be (and historically have been) adverse to the liberty interests of mentally retarded persons. At a time when Kentucky sought to implement a policy of providing support services for mentally retarded persons – including some then confined in institutions – in smaller, community facilities, opposition came mainly from parents of persons then institutionalized.[7] By permitting their parents, guardians, and others to participate as if parties in the commitment proceeding, Kentucky has burdened respondents in a way in which mentally ill persons are not. Indeed, by providing that involuntary commitment proceedings for the mentally ill shall be conducted like criminal proceedings, K.R.S. 202A.076(2) implicitly reserves to the mentally ill person only the right of appeal, just as the Kentucky Rules of Criminal

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[7] *See* R.34: Skarnulis depo. at 23-35, 55-56, 64, 71, and 109-112, J.A. at 18-26, 29-35; R.35: Fairchild depo. at 22-23, J.A. at 39-40; R.37: Draper depo. at 32, 68, and 70, J.A. at 40-42; and R.73: Middendorf depo. at 19, 26, and 42-43, J.A. at 46-48.

Procedure implicitly reserve that right solely to the defendant. RCr. 11.02(2).

The equal protection clause of the fourteenth amendment commands that no state shall "deny to any person within its jurisdiction the equal protection of the laws," which is essentially a direction that all persons similarly situated should be treated alike. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439, citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982). Equal protection requires that a classification be rationally related to a legitimate end. *Id.* at 442. Whatever differences may exist between mentally ill and mentally retarded persons, "mere identification of differences is not enough; equal protection 'require[s] that a distinction made have some relevance to the purpose for which the classification is made.' " *Baxstrom v. Herold*, 383 U.S. 107, 111 (1966), quoted below in *Doe v. Cowherd*, 965 F.2d 109, 112 (6th Cir. 1992), and *Doe v. Austin*, 848 F.2d 1386, 1394 (6th Cir. 1988). *See also Jimenez v. Weinberger*, 417 U.S. 628, 634-53 (1974) (classification must be rationally related to purpose of legislation); *USDA v. Moreno*, 413 U.S. 528, 534 (1973) (classification must be rationally related to purpose of legislation).

Ky. Rev. Stat. Ann. Chapter 202B codifies the procedures to be followed in involuntarily institutionalizing persons determined to be mentally retarded and to meet the other statutory criteria for institutionalization. K.R.S. 202B.040. That chapter includes procedural safeguards against unwarranted confinement, including an adversary hearing before a judge or jury on the issue of whether the allegedly mentally retarded person meets these criteria. K.R.S. 202B.160. Kentucky may constitutionally distinguish between those alleged to be mentally ill and those alleged to be mentally retarded with respect to the procedural safeguards provided by statute against unwarranted confinement only if there exist differences between the two groups that justify the distinction in view of the state's purposes in crafting and enforcing the commitment statute; only, that is, if the classification is rationally related to the state's legitimate purpose.

A. BECAUSE IT LACKS A RATIONAL BASIS, THE CHALLENGED CLASSIFICATION VIOLATES EQUAL PROTECTION.

To the extent that those who are mentally retarded have a reduced ability to cope with and function in the everyday world, the state has a legitimate interest in providing for them. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 442. The question here is whether, in determining whether confinement in a state institution is warranted, it is rational to treat those who are alleged to be mentally retarded differently from those who are alleged to be mentally ill. Kentucky claims that its classification is rational because there exist differences between mentally ill and mentally retarded persons that are relevant to the question of what procedural safeguards are appropriate to alleged mentally retarded persons facing civil commitment. However, CHR does not even attempt to demonstrate how the differences it alleges are relevant to the classification it seeks to defend.

1. The Challenged Classification Is Not Rationally Related to a Legitimate State Purpose Because the Differences Alleged Between Mentally Ill and Mentally Retarded Persons Are Inconsistent With the Evidence of Record.

CHR argues that (1) unlike mental retardation, which is a permanent condition requiring lifetime care, mental illness is usually able to be treated successfully; (2) institutionalization for mental illness may cause stigmatization but institutionalization for mental retardation does not; and (3) mental retardation is not subject to the same subtleties in diagnosis as is mental illness. Pet. Br. at 31-32. A brief response by a psychologist to a single question is offered in support of the first proposition. *Id.* at 31, citing R.69: Mann depo. at 29-30, J.A. at 45. But the expert testimony of record is far from unanimous on the question of the immutability of mental retardation.

Indeed, mental retardation is not a static state: intelligence quotient (IQ) scores and adaptive behavior – the two major references for assessing mental retardation – change over time. R.34: Skarnulis depo. at 19, J.A. at 16. The use of behavior modification, adaptive equipment, and other technologies "have enabled us to [e]ffect dramatic gains in a person's level of development that weren't even considered possible one or two decades ago." *Id.* at 20, J.A. at 17. All mentally retarded persons are capable of improvement or change. *Id.* at 21, J.A. at 17. Virtually all are capable of living in the community, given adequate services. R.34: Skarnulis depo. at 72, J.A. at 32; R.177: Mlinarcik depo. at 36 and 72, J.A. at 110 and 113-14. The evidence of record here, as in *Cleburne*, is that mentally retarded persons are not "all cut from the same pattern . . . [but are a] large and diversified group." 473 U.S. at 442. Moreover, CHR's assertions with respect to the issues of stigmatization and subtlety of diagnosis are wholly unsupported by evidence.[8]

Whatever the differences between mentally ill and mentally retarded persons – and the evidence suggests that differences among mentally retarded individuals themselves are sufficiently wide as to render almost meaningless any comparison based on stereotypic perceptions of them as a group – CHR has not begun to demonstrate how such differences would justify lowering the standard of proof for committing allegedly mentally retarded persons or permitting third persons, with potentially adverse interests, to participate as parties in the commitment proceeding. In any event, the court of appeals properly found that the differences between mentally ill and mentally retarded persons alleged by CHR were "unsupported by any evidence in the record." *Doe v. Cowherd*, 965 F.2d 109, 112 (6th Cir. 1992).

In *Cleburne*, this Court invalidated a zoning ordinance requiring a special use permit for a proposed group home for mentally retarded persons, holding that the requirement, as applied in that case, was not rationally related to a legitimate governmental purpose. 473

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[8] The states of New Jersey, et al. argue in their amicus brief for petitioner that mentally ill persons suffer a stigmatization that mentally retarded persons do not because, while the former are institutionalized because they are a danger to themselves or others, the latter are institutionalized only because they are unable to care for themselves. States' Brief at 8-9. This distinction finds no support in Kentucky where K.R.S. 202B.040, setting out criteria for involuntary admission to state institutions, requires a finding that the mentally retarded person "presents a danger or threat of danger to self, family, or others." K.R.S. 202B.040(1). In the ten years that this case has been in litigation, CHR has never adduced expert or other evidence in support of its claims and has failed to persuade any court that providing lesser protections to mentally retarded persons than to mentally ill persons is justified by differences between the two groups.

U.S. at 446. That conclusion, like the sixth circuit's decision here, was based on a finding that the record did not support the classification of the group home at issue as one that needed a special permit when all other residential and commercial uses faced no such requirement. 473 U.S. at 450.

If the differences in *Cleburne* – between a group home for mentally retarded persons, on the one hand, and apartment houses, fraternity and sorority houses, hospitals and the like, on the other – were not considered sufficient to justify the classification at issue in that case, still less do the purported differences between mentally ill and mentally retarded persons – all of whom are allegedly mentally disabled and are facing the same "massive curtailment of liberty," *Humphrey v. Cady*, 405 U.S. 504, 509 (1972) – justify the classification challenged here.

2. The Challenged Classification Is Not Rationally Related to a Legitimate State Purpose Because It Is Prejudicial to Base Hearing Procedures on an Issue That the Hearing Is Itself Designed to Adjudicate.

Ky. Rev. Stat. Ann. Chapter 202B, the Kentucky Mental Retardation Admission Act, establishes procedures for institutionalizing mentally retarded persons. The sections challenged here concern the procedures for determining whether the respondent meets the statutory criteria for involuntary commitment. *See* K.R.S. 202B.100(10) (decision on involuntary admission on completion of final hearing) and 202B.160(2), (3) (hearing procedures). The criteria themselves are set out in K.R.S. 202B.040:

> When a person who is alleged to be mentally retarded is involuntarily admitted, there shall be a determination that:
>
> (1) The person is a mentally retarded person;
>
> (2) The person presents a danger or threat of danger to self, family, or others;
>
> (3) The least restrictive alternative mode of treatment presently available requires placement in an ICF/MR; and
>
> (4) Treatment that can reasonably benefit the person is available in an ICF/MR.

As indicated above, K.R.S. Chapter 202B represents Kentucky's response, with respect to mentally retarded persons, to the holding of the district court in *Kendall v. True*, 391 F. Supp. 413 (W.D. Ky. 1975), subsequently reflected in this Court's holding in *Vitek v. Jones*, 445 U.S. 480, 495 (1980), that the liberty interest implicated in confining persons to institutions is sufficiently substantial to require procedural safeguards against unwarranted confinement.

The sections of Chapter 202B challenged here – lowering the standard of proof at the final hearing, permitting third parties, with interests potentially adverse to respondents, to participate as if parties, and permitting third party appeals – all represent an abridgement for mentally retarded persons of the procedural safeguards afforded by K.R.S. 202A to mentally ill persons facing institutionalization. Although CHR makes no serious attempt to demonstrate the relevance, the state's apparent justification for the added burdens is that K.R.S. 202B applies only to mentally retarded persons, who are, it is implied, relevantly different as a group from mentally ill persons. Pet. Br. at 32, 38. Prior to the final hearing provided by K.R.S. 202B, however, there is no finding that the subject of the hearing is a mentally retarded person; a determination of that issue is one of the purposes of the hearing. K.R.S. 202B.040(1). Prior to an adjudication on the issue of mental retardation, the hearing subject is only *allegedly* a mentally retarded person.

In deciding what procedural safeguards should be available in the process designed to determine whether a person is mentally retarded, any appeal to the differences between mentally ill and mentally retarded persons is clearly premature. Prior to adjudication, the allegedly mentally retarded, like the allegedly mentally ill, are simply persons facing a threat of confinement by the state. Any assumption of mental retardation prior to adjudication would be literally prejudicial (*prae-judicium*). Any classification based on such a prejudicial assumption could not be rationally related to the state's purpose in providing a commitment procedure. In arguing that, for purposes of the hearing designed to adjudicate the issue of mental retardation, allegedly mentally retarded persons are due fewer procedural safeguards against error because they are mentally retarded, the state's reasoning is patently circular.

A similar argument was rejected by this Court in *Baxstrom v. Herold*, 383 U.S. 107 (1966). Persons civilly committed in New York had the right under that state's Mental Hygiene Law to de novo review by jury trial of their sanity; this right was denied to individuals civilly committed after the expiration of a penal term. The state there argued that its law reasonably differentiated between the criminally insane and the civilly insane. In rejecting that argument, this Court held that distinguishing between criminally and civilly mentally ill persons

was irrelevant to the purpose of crafting a procedure for determining the very issue of mental illness:

> Classification of mentally ill persons as either insane or dangerously insane of course may be a reasonable distinction for purposes of determining the type of custodial or medical care to be given, but it has no relevance whatsoever in the context of the opportunity to show whether a person is mentally ill *at all*.

383 U.S. at 111 (emphasis in original).[9]

Clearly, *the nature of the proceeding* might justify certain procedures, such as a particular standard of proof, even in the adjudicatory hearing. Thus, a criminal prosecution in which a punitive exercise of state powers is threatened, warrants proof beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 361-62 (1970) (Harlan, J., concurring). For civil commitment, in which not only facts but the meaning of the facts must be determined, a lesser standard of proof is constitutionally permissible. *Addington v. Texas*, 441 U.S. 418, 429 (1979). These standards are not predicated on any premature adjudication of the issues to be decided at the hearing. By contrast, CHR wishes to base its lower standard of proof not on the *nature of the proceeding* – a civil commitment proceeding in the case of both allegedly mentally ill persons and allegedly mentally retarded persons – but on the *nature of mental retardation*. Both the fact of mental retardation and whether it renders a person so dangerous to self or others as to warrant institutionalization are issues to be determined at the adjudicatory hearing; as both *Baxstrom* and logic teach, they cannot rationally be the basis for lesser procedural safeguards at the hearing.

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[9] The allegedly mentally retarded person is no more unlike the allegedly mentally ill person than, in *Baxstrom*, the person facing civil commitment after completing a penal term was unlike a person who had served no term. Baxstrom, who was presumably not otherwise entitled to a de novo review by jury trial of the question of his sanity, was entitled to it as long as others facing civil commitment had that right; allegedly mentally retarded persons, even if not otherwise entitled to the beyond-a-reasonable-doubt standard, are entitled to it as long as others facing civil commitment are so entitled by statute.

Respondents here acknowledge that there may be differences between mentally ill and mentally retarded persons that have a bearing on the type of care they should receive or the frequency with which reviews of their confinement should be conducted.[10] Any such differences have no relevance, however, in the context of the opportunity to show whether a person is mentally retarded *at all*. By the very nature of a commitment proceeding designed to make that determination, differences that presuppose the determination are irrelevant.[11]

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[10] Respondents have not challenged, for example, the differences in Kentucky's review provisions for involuntarily committed mentally ill and mentally retarded persons, respectively. *See* K.R.S. 202A.051, 202B.250.

[11] Petitioner notes that, in *Kremens v. Bartley*, 431 U.S. 119, 135-36 (1977), this Court remanded an action involving institutionalization of 13-18-year-olds with an instruction to the district court that "careful attention must be paid to the differences between the mentally ill and the mentally retarded." Pet. Br. at 31. *Kremens* did not suggest that the differences would be "clearly relevant" to admission procedures, as petitioner asserts, *id.*, but noted the possibility that Pennsylvania's experience in implementing its commitment statute would shed light on the issue. 431 U.S. at 136. Here, the district and appellate courts have both paid careful attention to the differences and have concluded that they are not relevant to differences in the procedural safeguards that CHR seeks to defend. *Doe v. Cowherd*, 770 F. Supp. 354, 358 (W.D. Ky. 1991), J.A. at 167; *Doe v. Cowherd*, 965 F.2d 109, 112 (6th Cir. 1992), J.A. at 175.

B. THE CHALLENGED CLASSIFICATION DOES NOT WITHSTAND EQUAL PROTECTION ANALYSIS AT A HIGHER LEVEL OF SCRUTINY, APPROPRIATE HERE BECAUSE OF THE IMPORTANCE OF AN INDIVIDUAL'S RIGHT TO LIBERTY, AND BECAUSE CONGRESS HAS FOUND THAT INDIVIDUALS WITH DISABILITIES ARE ENTITLED TO A HIGHER LEVEL OF PROTECTION.

Even if this Court were to find that the differences alleged by CHR between mental illness and mental retardation were not only consistent with the empirical evidence of record but were also rationally related to the state's purpose in crafting the challenged civil commitment statute, both the importance of the threatened interest and the nature of the threatened class warrant closer scrutiny of the classification.

Although respondents did not argue this particular issue below, it is subsumed within our general argument that the challenged provisions violate the equal protection clause. *See* U. S. Supreme Court Rule 14.1(a). It is not, therefore, an additional question; nor does it change the substance of the questions presented in the petition. *See* Rule 24.1(a), 24.2. When respondents came before the district court in May 1990 on motions for summary judgment and preliminary injunction, R.201, the Sixth Circuit had already upheld respondents' equal protection arguments on the basis of the rational basis analysis set forth in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). *See Doe v. Austin*, 848 F.2d 1386, 1394-95 (1988). Respondents had no occasion to argue for a higher level of scrutiny either before the district court or before the Sixth Circuit, where respondents argued their case most recently on March 30, 1992. Since that time, *Foucha v.*

Louisiana, 112 S. Ct. 1780 (1992), was decided. In *Foucha*, this Court required that Louisiana put forward a "particularly convincing reason" for institutionalizing insanity acquittees on lesser grounds than the state required for institutionalizing others. *Foucha* strongly suggests a ground for urging a higher level of scrutiny for the classification challenged here and a reason to believe that the Court might apply stricter scrutiny based on Congress's finding, in connection with the Americans With Disabilities Act of 1990, that individuals with physical or mental disabilities are a discrete and insular minority.

1. Because the Challenged Classification Implicates an Important and Fundamental Right, It Cannot Withstand Equal Protection Analysis.

Freedom from bodily restraint has always been at the core of the liberty interest protected from arbitrary governmental action by the due process clause. *Foucha v. Louisiana*, 112 S. Ct. at 1785. It is clear that commitment for *any* purpose constitutes a significant deprivation of liberty. *Id.* at 1785, 1788; *Jones v. United States*, 463 U.S. 354, 361 (1983); *Addington v. Texas*, 441 U.S. 418, 425 (1979). This Court has always been careful not to "minimize the importance and fundamental nature" of the individual's right to liberty. *Foucha*, 112 S. Ct. at 1785, citing *United States v. Salerno*, 481 U.S. 739, 750 (1987). Because commitment involves physical restraint, and freedom from physical restraint is a fundamental right, the state must put forward a "particularly convincing reason" for providing different protections for different classes of people with respect to involuntary commitment. *Foucha*, 112 S. Ct. at 1788.

In providing for the commitment of mentally retarded persons under a clear and convincing standard, while requiring for commitment of mentally ill persons proof beyond a reasonable doubt, Kentucky denies to those alleged to be mentally retarded a protection it affords to those alleged to be mentally ill. The same is true of Kentucky's decision to permit the participation of parents, family members, and others as if they were parties in the commitment procedure for mentally retarded persons, including the right to appeal adverse decisions, while denying this participation in the procedures for committing mentally ill persons. CHR gives no convincing reason why all the procedural safeguards against unwarranted confinement guaranteed to those alleged to be mentally ill should not be available to those alleged to be mentally retarded.

Both groups constitute a "class of potential civil-commitment candidates." *Jones v. United States*, 463 U.S. 354, 367 (1983), quoted in *Foucha*, 112 S. Ct. at 1800 (Thomas, J., dissenting). In contrast to *Jones* and *Foucha*, there is no finding here of any criminal act on the part of persons allegedly mentally retarded that diminishes the deprivation at stake or diminishes concern about the risk of erroneous deprivation. *See Jones*, 463 U.S. at 367 & n.16. While CHR implies that differences in the nature of mental illness and mental retardation suggest that both the deprivation at stake and the risk of error are less for mentally retarded persons than for mentally ill persons, Pet. Br. at 30-32, any such differences – even if they were consistent with the empirical evidence of record, which they are not – would be irrelevant until a determination of mental retardation was made.[12] For the purposes of the adjudication process itself, those who are allegedly mentally ill and those who are allegedly mentally retarded are indistinguishable. Even were this Court to find, however, that differences exist between *allegedly* mentally ill persons and *allegedly* mentally retarded persons that are rationally related to the state's legitimate purpose, the challenged statute would not survive a review that required the state to advance a "particularly convincing" reason for the discrimination in view of the important liberty interest at stake.

In *Cleburne*, this Court reviewed a city's zoning ordinance excluding from permitted uses a group home for mentally retarded persons, and required that differences alleged between mentally retarded persons and other groups be both relevant to the city's purposes and firmly grounded in fact. 473 U.S. at 448-50. Unlike respondents here, respondents in *Cleburne* were not *allegedly* mentally retarded persons facing a commitment proceeding crafted by the legislature to determine, among other things, whether they were mentally retarded. The interest that was threatened by the challenged ordinance in *Cleburne* was not the right to be free from unwarranted confinement but only the right to establish a home in a particular area. If that interest warranted the careful attention given by this Court to the classification challenged in *Cleburne*, even more so does the interest at stake here warrant close attention to the state's classification and to the reasons advanced to justify it. If a zoning ordinance operates to exclude mentally retarded persons from the community by denying them the right to live in a particular neighborhood, so much more does a commitment statute which could relegate them indefinitely to the confines of an institution.[13]

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[12] *See* I.A.2, *supra* at 18-22.

2. Because Congress Has Indicated That Individuals With Disabilities Are a Discrete and Insular Minority, the Challenged Classification Cannot Withstand Equal Protection Analysis.

Under Section 5 of the fourteenth amendment, Congress has the power to enforce, by appropriate legislation, the provisions of that amendment. Section 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the fourteenth amendment. *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966). By enacting legislation to enforce the equal protection clause, Congress may prohibit enforcement of a state statute regardless of whether the judiciary would invalidate the state statute under the equal protection clause absent such legislation. *Id.* at 649-50. Under Section 5, Congress may enact laws to increase equal protection guarantees, although it may not "restrict, abrogate, or dilute these guarantees." *Id.* at 651 n.10; *see also Mississippi University for Women v. Hogan*, 458 U.S. 718, 732 (1982); *Oregon v. Mitchell*, 400 U.S. 112, 128-29 (opinion of Black, J.); *id.* at 248-49 & n.31 (opinion of Brennan, White, and Marshall, JJ.) (1970). Proper regard for the special function of Congress in making determinations of legislative fact compels this Court to respect those determinations unless they are contradicted by strong evidence. *Oregon v. Mitchell*, 400 U.S. 112, 241 (1970) (opinion of Brennan, White, and Marshall, JJ.).

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[13] CHR seeks to minimize the deprivation of liberty imposed by institutionalization, implying that civilly committed mentally retarded adults in Kentucky may leave their "residential settings" as they please. Pet. Br. at 4, 8. Nothing could be further from the truth. Sandra Mlinarcik, program director for mental retardation and developmental disabilities for Seven Counties Services, Inc., a Louisville mental health agency, poignantly suggested the realities of daily life in one of Kentucky's "residential settings:"

> When I was at Hazelwood for these assessments, everybody in a given unit was wrapped in a sheet and laid on a mat on the floor from ten to eleven-thirty every day to rest. I find it hard to believe that all of the individuals in that room all really physically needed a rest at that time.

R.177: Mlinarcik depo. at 68, J.A. at 112. Mlinarcik contrasted the routinization characteristic of institutions with the individualized care possible in more truly residential settings: "In an adult habilitation program, a person would rest during the day when they individually had a physical need to rest." *Id.* Skarnulis also contrasts the restrictive features of state institutions (distance from home and family, increased likelihood of inappropriate behaviors, depersonalization) with the advantages of community placement (in home community, surrounded by models of standard behavior, individualized attention, access to community resources). R.34 at 24-25, J.A. at 18-20.

In the findings and purposes provisions of the Americans With Disabilities Act of 1990 (ADA),[14] Congress has given a clear indication that all forms of discrimination against individuals with disabilities should be subject to strict judicial scrutiny. Specifically, Congress made findings that, historically, society has tended to isolate and segregate individuals with disabilities, 42 U.S.C. § 12101(a)(2); that discrimination against individuals with

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[14] Pub. L. No. 101-336, 104 Stat. 327 (1990), 42 U.S.C. §§ 12101-12213.

disabilities persists in such critical areas as institutionalization, *id.* § 12101(a)(3); that individuals with disabilities continually encounter various forms of discrimination, including overprotective rules and policies, *id.* § 12101(a)(5); and that

> individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.

Id. § 12101(a)(7). In enacting the ADA, Congress declared its intent to invoke the full sweep of congressional authority, including the power to enforce the fourteenth amendment, in order to address the major areas of discrimination faced day-to-day by people with disabilities. *Id.* § 12101(b)(4).

Although this Court has previously held that one sub-group of Americans with disabilities – individuals with mental retardation – do not constitute even a quasi-suspect class, *City of Cleburne v. Cleburne Living Center*, 473 U.S. at 443, Congress, in enacting the ADA, has indicated that all individuals with disabilities, including individuals with mental retardation, should be treated as a suspect class.[15] Congress's finding that individuals with disabilities are a "discrete and insular minority . . . relegated to a position of political powerlessness" reflects the language and theory of footnote 4 of *United States v. Carolene Products Company*, 304 U.S. 144, 152-53 (1938), in which this Court articulated a basis for heightened judicial scrutiny under the equal protection clause in cases of "prejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[16] Respondents draw to the Court's attention the findings set forth by Congress in enacting the ADA and urge the Court to apply the level of scrutiny that the Court has itself declared appropriate in reviewing classifications that burden members of a discrete and insular minority.

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[15] "Disability" is defined by the ADA to include mental impairments. 42 U.S.C. § 12102(2)(A). The legislative history of the ADA makes it clear that mental retardation is included

Under strict scrutiny, this Court has traditionally upheld a classification only if it is necessary to serve a

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among the mental impairments Congress intended to be covered by the enactment. *See* H.R. Rep. No. 485 (II), 101st Cong., 2d Sess. 51 (1990), H.R. Rep. No. 485 (III), 101st Cong., 2d Sess. 28 (1990), S. Rep. No. 116, 101st Cong. 1st Sess. 21-22 (1989).

[16] *Accord* Rains, *A Pre-History of the Americans with Disabilities Act and Some Initial Thoughts as to Its Constitutional Implications*, 11 St. Louis U. Pub. L. Rev. 185, 201 (1992). The House Judiciary Committee also signalled its intent that classifications burdening disabled individuals receive a higher judicial scrutiny: "The powers, remedies and procedures available to persons discriminated against based on disability shall be the same as, and parallel to, the powers, remedies and procedures available to persons discriminated against based on race, color, religion, sex or national origin." H.R. Rep. No. 485 (III), 101st Cong., 2d Sess. 48 (1990).

compelling governmental interest, striking down classifications either for the weakness of the interest they purport to serve or for their looseness of the fit between means and ends.[17] CHR attempts to justify reduced safeguards against unwarranted confinement in the very process designed to determine whether allegedly mentally retarded persons meet the statutory conditions for involuntary institutionalization, including whether they have mental retardation. A classification that threatens so important a right cannot be justified by an appeal to efficiency, *see* Pet. Br. at 25-26, especially when the state's desire to ease the respondents' transition into institutionalized care reflects the "overprotective policies" and "stereotypic assumptions" about their inability to participate in society that Congress, in enacting the ADA, found generally characteristic of society's treatment of individuals with disabilities. 42 U.S.C. § 12101(a)(5), (7). The record here indicates that even those whose concern for the welfare of mentally retarded adults need not be questioned may assume too readily that they need institutional confinement.[18] Kentucky insists on certain precautions to insure that persons alleged to be mentally ill do not lose their liberty on the basis of paternalistic or stereotypic assumptions. Absent weightier reasons than petitioner has advanced here, this Court should insist that the state guard with equal care the liberty of those alleged to be mentally retarded.

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[17] L. Tribe, American Constitutional Law, § 16-6, at 1453 (2d ed. 1988).

[18] Parents may underestimate both their adult children's capabilities, R.34: Skarnulis depo. at 109 and 112, J.A. at 32-35, and the capacity of the community to provide appropriate care in non-institutional settings. R.37: Draper depo. at 70, J.A. at 41. *See also* Karen Middendorf, director of mental retardation services at Region XIII Comprehensive Care Services, Maysville, Kentucky, on the need to counsel parents of adult mentally retarded persons "in terms of letting go a little bit, of not overprotecting, of recognizing that their child . . . is now an adult and needs to be doing adult things." R.73: Middendorf depo. at 43, J.A. at 48.

II. A STATE MAY NOT, CONSISTENT WITH DUE PROCESS, PERMIT THIRD PERSONS TO PARTICIPATE AS PARTIES IN INVOLUNTARY CIVIL COMMITMENT PROCEEDINGS FOR MENTALLY RETARDED ADULTS.

Civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection. *Addington v. Texas*, 441 U.S. at 425. Freedom from bodily restraint has always been at the core of the liberty protected by the due process clause from arbitrary governmental action. *Foucha v. Louisiana*, 112 S. Ct. at 1785, citing *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982). This Court has always been careful not to "minimize the importance and fundamental nature" of the individual's right to liberty. *Foucha v. Louisiana*, 112 S. Ct. at 1785, quoting *United States v. Salerno*, 481 U.S. 739, 750 (1987). The loss of liberty caused by civil commitment constitutes not only a loss of freedom from confinement, but also adverse social consequences (whether labeled as "stigma" or otherwise). *Addington*, 441 U.S. at 426. The "subtleties and nuances of psychiatric diagnoses" justify the requirement of adversary hearings. *Vitek v. Jones*, 445 U.S. at 495, quoting *Addington*, 441 U.S. at 430.

To meet due process demands, the standard of proof in civil commitment cases must be greater than the preponderance-of-the-evidence standard generally applicable in civil cases. *Addington*, 441 U.S. at 433. On the traditional presumption that parents act in the best interests of their children, a child facing civil commitment need not be afforded the same process due a person who has reached the age of 18, but some kind of inquiry should be made by a neutral factfinder to determine whether the statutory requirements for admission are satisfied. *Parham v. J.R.*, 442 U.S. 584, 604, 606 (1979). Identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burden that the additional or substitute procedural requirement would entail. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *Connecticut v. Doehr*, 111 S. Ct. 2105, 2112 (1991).

Under the statute challenged here, a parent or guardian of an alleged mentally retarded person facing involuntary commitment may hire a qualified mental retardation professional who shall be permitted to participate in any examination of the person and may submit findings, if any, to the court. K.R.S. 202B.140. Guardians and immediate family members shall be allowed to attend all hearings, conferences or similar proceedings; may be represented by private counsel; may participate in the hearings or conferences as if a party to the proceedings; may cross-examine witnesses; and have standing to appeal any adverse decision. K.R.S. 202B.160(3). Appeals may be taken not only by the person facing commitment but also by the person's guardian, limited guardian, or other "authorized representative." K.R.S. 202B.230.

These statutory provisions inject – into a procedure designed to balance the interests of the state and the individual – a cast of characters with interests of their own, not merely as witnesses whose testimony might aid the factfinder in reaching a decision on the issues delineated by statute but as contestants in their own right.

This Court has sought to balance the interests of the individual and the state, *Mathews v. Eldridge*, 424 U.S. 319; to tailor due process requirements to the age of the individual, *Parham v. J.R.*, 442 U.S. 584, and to the nature of the interest being threatened, *Vitek v. Jones*, 445 U.S. 480; and to allocate the risk of error between the litigants by requiring a certain standard of proof. *Addington v. Texas*, 442 U.S. 418. In all instances, those persons recognized by the Court as having a right to participate as parties for the purpose of urging their own interests are the state and the person whose interest the state is threatening. K.R.S. 202B does not threaten a liberty interest of any of the third parties to whom the challenged sections extend a role as if parties in the commitment proceedings. None of them is facing a massive curtailment of liberty; none of them is a state actor; none of them is on either side of the balance required by *Eldridge*. To permit such participation by parties whose own interests may be adverse to the

interests of respondents would skew the balance proposed in *Eldridge* and burden respondents in ways never envisioned in *Vitek*.[19]

Nor is the expanded participation justified by any state interest. Although the state asserts its interest in gathering relevant information about respondents from third parties, Pet. Br. at 37, mechanisms have always been available for this purpose. The state may subpoena them as witnesses; there is no need to include them as parties.

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[19] The balancing described in *Eldridge* may sometimes involve several parties, each represented by counsel, as when the interests of state, child, and parent are weighed in a petition to terminate parental rights. *See, e.g.*, *Lassiter v. Dep't of Social Serv. of Durham County*, 452 U.S. 18 (1981). The situation of the child in *Lassiter*, however, is easily distinguishable from that of the parent or guardian here. While it is the parent's liberty interest that is threatened by the state in a termination case, the interests of the child – as the other party to the legal relationship under threat – are immediately implicated. By contrast, the threat to the liberty of the mentally retarded adult facing involuntary commitment does not threaten to sunder any legal relationship between the adult and his or her parent or guardian.

The interests of Tracy Horton's parents, the petitioner asserts, were "every bit as legitimate as the Commonwealth's." Pet. Br. at 37. Perhaps so: family members and members of the general public can frequently be said to have legitimate interests in the outcome of proceedings that pit the interests of the state against the interests of an individual, but this is to use "interest" in a broader sense than it is used in *Eldridge*. The fourteenth amendment liberty interests at stake in a proceeding are determined by the narrow scope of the proceeding – here a commitment proceeding – not by the broad reach of its repercussions. The attempt to cast parents and guardians as parties with interests at stake in the commitment proceeding is part of petitioner's larger argument that the parents' interests are not really distinguishable from the interests of their adult mentally retarded children and that, accordingly, this Court should extend *Parham* to cover mentally retarded adults, that is, treat mentally retarded adults as children for purposes of commitment. Pet. Br. at 20-28. Respondents deal with that issue in Section III, *infra*.

III. THIS COURT SHOULD NOT REVIEW THE QUESTION OF WHETHER A STATE MAY CONSIDER VOLUNTARY THE CIVIL COMMITMENT OF MENTALLY RETARDED ADULTS ON THE SUBSTITUTED CONSENT OF THEIR LEGAL GUARDIANS, BECAUSE IT WAS NOT PROPERLY RAISED BY PETITIONER; ALTERNATIVELY, THE COURT SHOULD REJECT THE CONCEPT AS A VIOLATION OF DUE PROCESS AND EQUAL PROTECTION.

Petitioner's request that this Court address the issue of whether CHR may treat as voluntary the commitment of mentally retarded adults to state institutions on the substituted consent of their legal guardians is raised in clear violation of this Court's rules. Nor does petitioner make any argument as to why the Court should suspend its rules in this instance. Were the Court to consider the issue, it should reject petitioner's contention as a violation of the due process and equal protection clauses of the fourteenth amendment.

A. BECAUSE THE ISSUE WAS NOT FAIRLY INCLUDED BY THE QUESTIONS PRESENTED IN THE PETITION FOR CERTIORARI, IT HAS BEEN WAIVED.

The question of whether Kentucky may consider voluntary the admission of an adult mentally retarded person on the substituted consent of a legal guardian is not properly before the Court. Only the questions set forth in the petition, or fairly included therein, will be considered by the Court. Rule 14.1(a). A petitioner's brief on the merits "may not raise additional questions or change the substance of the questions already presented" in the petition for certiorari. Rule 24.1(a).

Petitioner's certiorari petition raised three questions. Petition for Writ of Certiorari at i. Petitioner again presents those same questions in his brief on the merits, *compare id.* with Pet. Br. at i, questions 2-4, and also introduces an entirely new question (stated here as a proposition): "CHR's admission of mentally retarded adults to its ICF/MR facilities as voluntary residents upon the substituted consent of their legal guardians and after independent professional review does not violate either Due Process or Equal Protection." Pet. Br. at i, question 1. More than 40 percent of petitioner's argument is devoted to the improperly raised question. *See* Pet. Br. at 18-28.

In *Princeton University v. Schmid*, this Court stated, with respect to a dispute over a regulation that had been amended while the case was on appeal, "We do not sit to decide hypothetical issues or to give advisory opinions about issues as to which there are not adverse parties before us." 455 U.S. 100, 102 (1982). Similarly, CHR's new question would have this Court render an advisory opinion concerning an issue now moot: the Kentucky statute which once defined as voluntary any commitment based on the application of an allegedly mentally retarded person's parent or guardian was repealed in 1990.

In *Irvine v. California*, 347 U.S. 128, 129 (1954), the Court refused to take up questions "smuggled into" the case after certiorari had been granted. *See also Phillips Chemical Co. v. Dumas School District*, 361 U.S. 376, 386 n.12 (1960); *Radio Officers' Union v. NLRB*, 347 U.S. 17, 37 n.35 (1954); *Mazer v. Stein*, 347 U.S. 201, 206 n.5 (1954) ("The fact that the issue was mentioned in argument does not bring the question properly before us"). This is precisely the situation here. The question which petitioner now wishes to insert into this case was argued before and decided by the Sixth Circuit in a 1988 opinion which this Court chose not to review. *Doe v. Austin*, 848 F.2d 1386, *cert. denied*, 488 U.S. 967. It was not raised by petitioner in arguments before the Sixth Circuit whose 1992 opinion, reported *sub nom. Doe v. Cowherd*, 965 F.2d 109, is here under review. It was not, as we have indicated, before this Court when it granted the petition for certiorari.

Although Rule 24.1(a) states that, "[a]t its option . . . the Court may consider a 'plain error' not among the questions presented but evident from the record and otherwise within its jurisdiction to decide," this power is the Court's, not a party's, and is limited, in the review of federal court proceedings, to exceptional circumstances where the errors "seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States v. Atkinson*, 297 U.S. 157, 160 (1936), quoted in *Silber v. United States*, 370 U.S. 717, 718 (1962), and *Connors v. Finch*, 431 U.S. 407, 421 n.19 (1977). No such circumstances are alleged here. As we have noted, the question which petitioner belatedly seeks to inject into this case was fully litigated at an earlier stage of this case. *Doe v. Austin*, 668 F. Supp. 597 (W.D. Ky. 1986), *aff'd in part, rev'd in part*, 848 F.2d 1386 (6th Cir.), *cert. denied*, 488 U.S. 967 (1988). Petitioner presents no argument as to why the issue should be relitigated years later in this forum. Respondents, accordingly, respectfully request this Court to decline consideration of this question.

B. ALTERNATIVELY, THIS COURT SHOULD REJECT, AS A VIOLATION OF DUE PROCESS AND EQUAL PROTECTION, PETITIONER'S CONTENTION THAT A STATE MAY CONSIDER VOLUNTARY THE COMMITMENT OF A MENTALLY RETARDED ADULT ON THE SUBSTITUTED CONSENT OF A LEGAL GUARDIAN.

Persons who are unable, on account of a mental disability, to give informed consent to institutionalization do not thereby lose their right to a determination, with appropriate procedural safeguards, as to whether they meet the statutory criteria for involuntary institutionalization. *Zinermon v. Burch*, 494 U.S. 113, 133-34 (1990). Petitioner would bypass entirely the statutory procedure now embodied in K.R.S. 202B for involuntary commitment by treating as voluntary any commitment initiated on the petition of the legal guardian of an alleged mentally retarded adult. The Court should reject this argument.

1. This Court Should Reject as Inconsistent With Due Process a State's Treating as Voluntary the Commitment of an Allegedly Mentally Retarded Adult on the Substituted Consent of a Legal Guardian.

a. Because the Interests of Parents and Guardians May Not Be Presumed to Be Coextensive With the Interests of Their Adult Mentally Retarded Children or Wards, This Court's Holding in *Parham* Is Inapplicable to the Commitment of Mentally Retarded Adults.

In arguing for an extension of *Parham v. J.R.*, 442 U.S. 524 (1979), to the adult respondents here, CHR refers to *Parham's* balancing of private and governmental interests, Pet. Br. at 21 (citing 442 U.S. at 599-600), and then states without citation to *any* authority, with respect to the private interests involved, that "the interest of parents in the health and welfare of their mentally retarded children does not cease when these children become chronological adults." Pet. Br. at 27. CHR grudgingly concedes that "mentally retarded adults have a liberty interest" in not being unnecessarily confined, *id.* at 22, but this liberty interest is not further discussed and is thereafter given no weight in petitioner's assessment of the proper balance of the interests at stake. *See id.* at 26-29. The thrust of CHR's argument is that the interests of mentally retarded adults and those of their parents and guardians are presumed to be coextensive, as this Court accepted in *Parham* with respect to parents and their minor children. *Parham v. J.R.*, 442 U.S. at 610. Indeed, petitioner argues, so indistinguishable are the interests of the mentally retarded adult and his or her family members or legal guardian that it is meaningless to regard the latter as "third" parties in the involuntary commitment proceeding. Pet. Br. at 34.

In 1988, the Sixth Circuit properly held, however, that "the traditional interrelationship of interests shared by parents and their minor children is not as presumptive as the minor passes from childhood to adulthood." *Doe v. Austin*, 848 F.2d 1386, 1392. The Kentucky legislature has admitted as much, in giving to guardians and immediate family members a right to appeal any decision adverse to them, even though the decision may not be adverse to the person facing commitment. K.R.S. 202B.160(3). "Once someone becomes an adult, one's parents lose that degree of authority found so crucial in *Parham*," the Sixth Circuit noted. *Doe v. Austin*, 848 F.2d at 1393, quoting *Clark v. Cohen*, 613 F. Supp. 684, 699 (E.D. Pa. 1985). "Moreover, the interest of the parents in avoiding 'significant intrusion into the parent-child relationship,' as noted in *Parham*, 442 U.S. at 610, is simply not as great in the case of an adult." *Doe v. Austin*, 848 F.2d at 1393.

Not only can there be no presumption of an identity of interests between adults facing institutionalization and their parents and guardians, but guardians may have no family ties with the person facing institutionalization. K.R.S. 387.510(3) (a guardian may be any "individual, agency, or corporation" appointed by the court); *see Doe v. Austin*, 848 F.2d at 1392, quoting *Kentucky Ass'n for Retarded Citizens v. Conn*, 510 F. Supp. 1233 (1980). Moreover, the record in this case provides ample support for the proposition that the interests of parents in Kentucky have been frequently inimical to their adult mentally retarded children's liberty interests. At a time when Kentucky, as a matter of public policy, sought to place in less restrictive, community settings institutionalized mentally retarded adults who, in the judgment of mental retardation professionals, could be better served there, parents of the institutionalized adults effectively crippled the program.[20]

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[20] *See* R.34: Skarnulis depo. at 23-35, J.A. at 18-26 (parents block access of CHR Division of Community Services to mentally retarded persons for purposes of placement under New Neighbors Program), *id.* at 29-30 (parents are biggest barrier to placement), *id.* at 32-35 (parents and adult children's needs not identical; parents may lack knowledge, make inappropriate decisions, underestimate adult children's potential); R.35: Fairchild depo. at 22-23, J.A. at 39-40 (parent or guardian permitted to veto discharge of adult child or ward from state institution); R.37: Draper depo. at 69-70, J.A. at 41-42 (placement decision should be primarily in hands of mental retardation professionals); and R.73: Middendorf depo. at 19, 26, and 42-43, J.A. at

Allegedly mentally retarded adults brought before a tribunal for an adjudication of whether they meet statutory criteria for institutionalization in state facilities are entitled to presumptions of emancipation and freedom from confinement: They are simply "*potential* civil-commitment candidates." *Jones v. United States*, 463 U.S. at 367 (emphasis added). To determine the procedural safeguards to which they are entitled on a presumption that their interests, including their liberty interests, are adequately represented by their parents or guardians, is to prejudge the very issue that the commitment procedure is designed to determine – namely, that a condition of mental retardation has rendered them so dependent that institutionalization is the only available means to protect them or others from danger. K.R.S. 202B.040.

Mentally retarded persons differ widely as to their intellectual functioning and adaptive behavior; they are also capable of improved functioning over time. R.34: Skarnulis depo. at 19-21, J.A. at 16-17. Many of those now institutionalized could live in the community, given proper support. R.177: Mlinarcik depo. at 72, J.A. at 113-114. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. at 442 ("Nor are [mentally retarded persons] all cut from the same pattern: as the testimony in this record indicates, they range from those whose disability is not immediately evident to those who must be constantly cared for"); *Penry v. Lynaugh*, 442 U.S. 302, 338-39 (O'Connor, J.) ("Mentally retarded persons are individuals whose

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46-48 (parental objections block release of information, discharge of institutionalized adults, to New Neighbors Program; parents counseled on not overprotecting adult children).

abilities and experiences can vary greatly.")[21] Petitioner's argument that states should be permitted to treat mentally retarded adults as perpetual children takes no account either of the differences among mentally retarded persons or of the development of which a mentally retarded individual is capable.

Parents and legal guardians have not infrequently proven adverse to their adult retarded children's liberty interests, resisting placement in less restrictive settings deemed by mental retardation professionals to be more appropriate, either because of overprotectiveness, ignorance of their adult children's and wards' capabilities, or ignorance of the capacity of the community to provide appropriate services.[22]

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[21] In *Penry*, Justice O'Connor analyzed the pitfalls in comparing mentally retarded adults with children, including the possibility that reliance on "mental age" to measure the capabilities of a retarded person for purposes of the eighth amendment "could have a disempowering effect if applied in other areas of the law." 442 U.S. at 339-40. CHR's recitation of the supposed "mental age" of allegedly mentally retarded adults, Pet. Br. at 6, provides no reliable basis for effectively disempowering them in the commitment process.

[22] *See* R.34: Skarnulis depo. at 71-72, J.A. at 31-32; R.37: Draper depo. at 32 and 70, J.A. at 40-42; R.73: Middendorf depo. at 19 and 42-43, J.A. at 46-48; R.177: Mlinarcik depo. at 36, 46-47, 68-69, 72-74, J.A. at 110-115.

The needs of adult mentally retarded children and the needs of their parents and guardians are "not synonymous." R.34: Skarnulis depo. at 109, J.A. at 33. Petitioner's argument that guardians can be presumed adequately to represent the interests of their wards, even to the point of bypassing the procedural safeguards of a hearing designed to test the state's claim that a person is mentally retarded and so dependent as to require institutionalization, is based on an assumption that mentally retarded adults are all alike, as helpless as young children. Pet. Br. at 22. That is a stereotyping to which disabled individuals have for too long been subject, as Congress recently found. 42 U.S.C. § 12101(a)(7). This Court should reject the argument for an expansion of *Parham* because it is founded on a morally unacceptable and factually inaccurate stereotype and because it is inadequate to meet the constitutional requirement of due process.[23]

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[23] In their amicus brief, the states of New Jersey, et al. note, in support of their argument that states should be permitted to employ a "less adversarial" procedure in institutionalizing mentally retarded adults, that there is a wide variation in the abilities and needs of retarded persons, that two out of every three persons with severe retardation are *not* in institutions, and that the states have made significant progress in reducing the number of mentally retarded persons in institutions. States' Brief at 14-16. Assuming the accuracy of these assertions, they support the *respondents'* argument for maintaining, rather than eroding, the procedural safeguards against an unwarranted deprivation of liberty. The states, moreover, would press *Cleburne* into service, noting this Court's comment that states should have "a certain amount of flexibility and freedom from judicial oversight in shaping and limiting their remedial efforts." States' Brief at 15, quoting *Cleburne*, 473 U.S. at 445. This comment occurs, however, in a discussion of the need for heightened scrutiny of classifications burdening mentally retarded persons. While this Court held then that heightened scrutiny was not warranted, it certainly lent no support to the view that mentally retarded adults facing institutionalization should enjoy any fewer procedural safeguards than those specified in *Vitek v. Jones*, 445 U.S. at 494-495. Respondents have no desire to see the states "forced into a common, uniform mold." States' Brief at 15, quoting *Addington v. Texas*, 441 U.S. at 430-431. The issue is not uniformity but minimum guarantees consistent with due process and equal protection.

b. Because the Medical Nature of the Inquiry Does Not Justify Dispensing With the Due Process Requirements Specified in *Vitek* for Involuntary Commitment Proceedings, the Court Should Require That States Provide Adversary Proceedings for Mentally Retarded Adults Facing Institutionalization.

According to petitioner, the issues involved in the commitment procedure are "whether the ward is mentally retarded and whether he [or she] can benefit from the available habilitation services which CHR can provide." Pet. Br. at 26. The questions, petitioner notes, are "essentially, if not overwhelmingly, medical in character." *Id.* In determining the appropriateness of such medical decisions, petitioner argues, the "supposed protections of an adversary judicial proceeding . . . may be more illusory than real." *Id.* Nor is there any "reason to believe that lay jurors are more adept in answering these medical questions than trained medical and mental retardation professionals." *Id.*

These statements disregard constitutional principles and misapprehend respondents' position. First, respondents do not contend that due process requires that adults facing involuntary commitment be afforded a judicial hearing. *See Doe v. Austin*, 848 F.2d at 1393. At issue here is whether due process requires that respondents be afforded an adversary hearing. *Vitek v. Jones*, 445 U.S. at 494-95. In arguing that it does not, petitioner defines too narrowly the issue at stake, omitting entirely the questions of whether the allegedly mentally retarded person presents a danger or a threat of danger to self, family, or others, or whether the least restrictive alternative mode of treatment presently available requires placement in an ICF/MR. K.R.S. 202B.040(2) and (3). These clearly are issues that implicate the mentally retarded adult's liberty interest. *Foucha v. Louisiana*, 112 S. Ct. at 1784, citing *Jones v. United States*, 463 U.S. at 368.

This Court has recognized that questions that "[turn] on the meaning of facts which must be interpreted by expert psychiatrists and psychologists" are essentially medical in nature, *Vitek v. Jones*, 445 U.S. at 495, citing *Addington v. Texas*, 442 U.S. at 429, but has held that "[t]he medical nature of the inquiry does not justify dispensing with due process requirements." 445 U.S. at 495, citing *Addington*, 442 U.S. at 430. Indeed, "[i]t is precisely '[t]he subtleties and nuances of psychiatric diagnoses' that justify the requirement of adversary hearings." *Id.* The Court held, accordingly, that an adult facing civil commitment was entitled to written notice; a hearing at which the state would be required to present its evidence and the person facing commitment would have an opportunity to be heard and present documentary evidence; an opportunity to present testimony of witnesses by the defense and to cross-examine state witnesses; an independent decisionmaker; a written statement by the factfinder as to the evidence relied on; and the availability of legal counsel. *Vitek*, 445 U.S. at 494-495. Where a "massive curtailment

of liberty" was at stake, *id.* at 491, citing *Humphrey v. Cady*, 405 U.S. at 509, the Court did not rely on the possibility that these procedural safeguards "may be more illusory than real." Neither should the Court do so here. An allegedly mentally retarded person facing institutionalization is entitled to a vigorous argument of the case for freedom. The so-called "medical model" of decisionmaking offered by petitioner provides no such guarantee.

c. Because Different Issues Are at Stake in Each Proceeding, the Procedural Safeguards Available Under Kentucky's Guardianship Statutes Are Not a Constitutionally Adequate Substitute for Purposes of Involuntary Commitment.

Petitioner implies that the adversary hearing provided under Kentucky's guardianship statutes provides adequate due process safeguards for the mentally retarded adults facing institutionalization, and thus, once a guardianship exists, the guardian may "voluntarily" institutionalize a mentally retarded adult (the ward). Pet. Br. at 23-25. The Court should reject this argument. The issue at stake in the guardianship proceeding – "whether the respondent is disabled . . . in relation to the management of his personal affairs and in relation to the management of his financial affairs," Pet. Br. at 24, *see* K.R.S. 387.580(1)(c) and (d) – is entirely distinct from those at stake in the involuntary commitment proceeding. A person may be adjudicated disabled under K.R.S. 387.580 and not meet one of the statutory criteria for institutionalization under K.R.S. 202B.040. It is the clear import of *Vitek v. Jones*, 445 U.S. 480, that due process requires an adversary hearing on the issue of the propriety of institutionalization, not merely on the issue of ability to manage one's personal and financial affairs, before a person may be civilly committed.

2. Because Kentucky Does Not Consider Voluntary the Commitment of a Mentally Ill Adult on the Substituted Consent of a Legal Guardian, This Court Should Reject as a Denial of Equal Protection CHR's Argument That the State May Treat as Voluntary the Commitment of Mentally Retarded Adults.

Although petitioner asserts that the "admission of mentally retarded adults to . . . ICF/MR facilities as voluntary residents upon the substituted consent of their legal guardians and after independent professional review does not violate . . . equal protection," Pet. Br. at 20, CHR makes no further argument in support of that proposition. Equal protection commands that no state shall "deny to any person within its jurisdiction the equal protection of the laws," which is essentially a direction that all persons similarly situated should be treated alike. *City of Cleburne v. Cleburne Living Center*, 473 U.S. at 439, citing *Plyler v. Doe*, 457 U.S. at 216. Petitioner neither cites, nor claims to be able to cite, any Kentucky statute which would permit CHR to consider voluntary the institutionalization of a mentally ill adult on the substituted consent of a legal guardian. While a guardian may petition for commitment of an allegedly mentally ill adult ward, such a petition would fall under the provisions of K.R.S. 202A governing *involuntary* commitment. 202A.051(3). To permit Kentucky to treat as voluntary the

commitment of mentally retarded adults on the substituted consent of their guardians would escalate to new heights the inequality in the treatment of mentally retarded and mentally ill persons of which respondents complain in the existing statute. Rather than remedy the equal protection deficiencies in K.R.S. 202B, petitioner would revert to the informal institutionalization of mentally retarded adults that existed in Kentucky until a federal district judge enjoined the practice in 1986, J.A. at 73, a procedure which used a definition of voluntariness that was "to say the least, expansive." *Doe v. Austin*, 848 F.2d at 1392.

Especially as the nation struggles to move beyond "stereotypic assumptions not truly indicative of the individual ability [of disabled individuals] to participate in, and contribute to, society," 42 U.S.C. § 12101(a)(7), this Court should resist the efforts by petitioner to turn back the clock to a time when institutionalization for mentally retarded persons was routine and procedural safeguards against unwarranted institutionalization, at least in Kentucky, practically non-existent.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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No. 92-351

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

LEONARD E. HELLER, Secretary,
KENTUCKY CABINET FOR HUMAN
RESOURCES - - - - - - - - Petitioner

versus

SAMUEL DOE, by His Mother and
Next Friend, MARY DOE, Et Al. - Respondents

On Writ of Certiorari to the
United States Court of Appeals
For the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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No. 92-351

IN THE

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October Term, 1992

LEONARD E. HELLER, Secretary, KENTUCKY
CABINET FOR HUMAN Resources - - - *Petitioner*
v.
SAMUEL DOE, by His Mother and Next Friend,
MARY DOE, Et Al. - - - - - - - *Respondents*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

ARGUMENT

1. The Issue Concerning Voluntary Admission of Mentally Retarded Persons to State Operated ICF/MR Facilities Upon the Substituted Consent of Their Legal Guardians Is Properly Before the Court.

For more than 10 years now, the parties to this proceeding have been litigating the procedures which are constitutionally required before mentally retarded persons in Kentucky may receive habilitative services from the Intermediate Care Facilities for the Mentally Retarded (ICF/

MR's) operated by the Kentucky Cabinet for Human Resources (CHR).

In the four years preceding the filing of the complaint in this proceeding, Doe's counsel and petitioner litigated the issue of whether the Constitution and federal law prohibited CHR from constructing or operating residential facilities for the mentally retarded. *See Kentucky Association for Retarded Citizens* v. *Conn*, 510 F. Supp. 1233 (W.D. KY 1980), aff'd 674 F.2d 582 (6th Cir. 1982). That litigation having been resolved in favor of permitting CHR to continue to construct and operate residential facilities for the care of the mentally retarded, the focus of litigation apparently shifted toward making it as difficult as possible for CHR to utilize those facilities.

The paramount issue throughout the course of the instant litigation, however framed for purposes of argument, has been: What procedural hoops and hurdles must the state place in the path of legal guardians for the mentally retarded who believe that the health, safety and welfare of their wards require that habilitative services be provided to their wards in a residential setting?

In the previous litigation, the District Court had held that the decision to place or retain a mentally retarded individual in a residential facility "should be left to a decision-maker such as the interdisciplinary team rather than in the hands of a court or court-appointed official." *Kentucky Association for Retarded Citizens* v. *Conn*, 510 F. Supp. 1233, 1249 (W.D. KY 1980).

The same determination was contained in the District Court's initial Memorandum Opinion in the instant litigation. (R. 106, pp. 10-12). However, the District Court subsequently determined that additional procedural protections were required by the Due Process and Equal Protection Clauses. (R. 117, pp. 4-5; R. 126, pp. 7-8).

The Kentucky General Assembly was then put to the task of designing a set of procedures for commitment of the mentally retarded to CHR's residential facilities patterned sufficiently like the Commonwealth's procedures for involuntary hospitalization of the mentally ill as to meet the anticipated Equal Protection challenges.

CHR's admission practices were thus transferred from a medical model based upon consideration and determination by qualified mental retardation professionals empowered by a court authorized fiduciary for the mentally retarded person to a judicial model based upon adversary proceedings and determined by lay jurors.

The issues presented herein are whether the judicial model is constitutionally required for the admission to a residential facility of mentally retarded adults who have insufficient mental capacity to provide their own informed consent to admission and, if so, whether Kentucky has provided adequate procedures for the court-mandated adversary proceedings.

Resolution of the threshold issue is of critical importance to the States that allocate significant public resources to the provision of services and programs for the mentally retarded, the professionals who operate such programs and to the families and legal guardians of the mentally retarded who are morally and legally responsible for their physical, mental and emotional well-being.

This issue, whether discussed in terms of admissions made voluntary by substituted consent or admissions based upon the medical model, transcends and is incorporated within every other issue presented herein.

2. The Rational Basis Standard Provides the Appropriate Level of Scrutiny for Equal Protection Review of State Legislation Containing a Classification of Individuals Based Upon the Condition of Mental Retardation.

City of Cleburne, Texas v. *Cleburne Living Center*, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985), contains a detailed analysis of the factors considered by this Court in determining the appropriate level of scrutiny to be applied to State legislation treating people differently based upon the classification of mental retardation.

Cleburne observed that the mentally retarded are immutably different from other individuals and that the States have a legitimate interest in dealing with and providing for them. *Id.* 473 U.S. at 443. State and Federal legislators have been responsive to the plight of the mentally retarded by adopting legislation outlawing discrimination and mandating appropriate treatment, services, education and habilitation. *Id.* 473 U.S. at 444-445. The legislative response to the plight of the mentally retarded indicates that the retarded possess broad-based public support and political power in the legislative process. *Id.* 473 U.S. at 445. Moreover, the mentally retarded represent a large and amorphous class which makes application of increased levels of scrutiny awkward and inappropriate. *Id.* 473 U.S. at 446.

After reviewing the foregoing factors, *Cleburne* held that the mentally retarded would not be considered a quasi-suspect class and that state legislation distinguishing the mentally retarded from others would withstand Equal Protection review if the legislation was rationally related to a legitimate government purpose. *Id.* 473 at 447.

Respondents now assert that the passage of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101-12213, was tantamount to a legislative overruling of *Cleburne*'s analysis of the status of the mentally retarded for Equal Protection review. Respondent's Brief, pp. 27-32.

No part of the legislative history of the ADA relied upon by Respondents establishes any Congressional intent to overrule *Cleburne*'s analysis of the issue. Reliance upon the passage of the ADA as requiring a higher level of scrutiny for the mentally retarded is somewhat suspect in view of the fact that the mentally retarded constitute but a small segment of the persons with disabilities receiving protections under the Act. 42 U.S.C. § 12102(2).

Passage of the ADA with its widespread consequences would appear to strengthen *Cleburne*'s observation that the mentally retarded are not politically powerless. This observation was also demonstrated in passage of the Rehabilitation, Comprehensive Services and Developmental Disabilities Act of 1978, Pub. L. 95-602; and the Civil Rights of Institutionalized Persons Act of 1980, 42 U.S.C. § 1997, et seq., in addition to the legislation cited in *Cleburne*.

At the state level, the Commonwealth of Kentucky has created a Department for Mental Health and Mental Retardation Services to administer state programs for the mentally ill and the mentally retarded. KRS 194.030(9). A separate and independent Department of Public Advocacy has also been created to pursue all legal, administrative and other appropriate remedies to insure protection of the rights of the developmentally disabled. KRS 31.010.

The manifest purpose behind most, if not all, of the legislation singling out the mentally retarded is to bestow a perceived benefit upon this clearly distinguishable segment of society. A higher standard of review of State legislation could easily penalize the retarded by depriving them of these substantial benefits.

Petitioner respectfully submits that this Court's analysis of the plight of the mentally retarded set forth in *Cleburne* has proven to provide the appropriate balancing of the various factors to be considered for purposes of the Equal Protection clause and there is no legitimate reason to heighten the level of scrutiny applied to State legislation affecting the mentally retarded.

3. The Participation of the Legal Guardians and Immediate Family of the Mentally Retarded in the Involuntary Commitment Process Does Not Deprive the Retarded of Due Process.

The procedures adopted by Kentucky for the involuntary commitment of mentally retarded persons to residential facilities operated by CHR are part of a continuum of services provided to the retarded in the Commonwealth.

Mentally retarded persons do require specialized education, training and care. *Halderman* v. *Pennhurst State School and Hospital*, 610 F.Supp. 1221, 1223 (D.C. PA 1985). The focus of this specialized care, called habilitation, is upon training and development of needed skills. *Youngberg* v. *Romeo*, 457 U.S. 307, 320 n.1, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982). Although there is significant disagreement on the subject, *see Id.* 457 U.S. 317, n.20, the prevailing view among professionals is that the level of functioning, i.e., lessening of dependence upon others, of every retarded person may be improved by proper habilitation. *Halderman*, 610 F. Supp. at 1223.

The skills acquired by habilitation are not learned permanently by the retarded. *Philadelphia Police and Fire Assoc. for Handicapped Children, Inc.* v. *City of Philadelphia*, 874 F.2d 156, 158 (3rd Cir. 1989). Cessation of habilitation is followed by regression in basic living skills. *Id.* at 158. Regression in such skills equates to an increased dependence upon others.

The issue for the mentally retarded person is not whether he or she will receive habilitation services. Receipt of such services has been determined to be necessary for the retarded if not an enforceable right. *Halderman* v. *Pennhurst State School and Hospital*, 451 U.S. 1, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981).

The vast majority of mentally retarded persons receive such services while living in their homes. Services made available in the community through state agencies like CHR permit 97 to 98 percent of the retarded to remain in the community. (R. 34, p. 28). Those persons whose level of retardation and familial support make living at home impractical may find appropriate living arrangements in state-funded group homes or other living arrangements designed for the retarded. A small percentage of the retarded, made up mostly of persons suffering from severe and profound retardation, cannot obtain adequate services at home or in the community and are thus referred to residential facilities operated by CHR.

Placement in one of CHR's facilities is not considered a permanent placement. The facility must discharge any resident whose care and treatment in an ICF/MR is no longer necessary, KRS 202B.021(3), KRS 202B.170(2), KRS 202B.240(2), i.e, a less restrictive placement for receipt of habilitation services is available.

The decisions of the District Court and Sixth Circuit herein require that any mentally retarded adult admitted to one of CHR's facilities who is not competent to secure his own admission be admitted utilizing involuntary commitment procedures similar to those utilized for involuntary hospitalization of the mentally ill. These procedures require a judicial determination that: i) the person is mentally retarded; ii) the person presents a danger or threat of danger to self, family, or others; iii) the least restrictive alternative mode of treatment presently available requires placement in an ICF/MR; and iv) treatment that can reasonably benefit the person is available in an ICF/MR. KRS 202B.040.

A verified petition seeking such determination may be filed in a state district court. KRS 202B.100. Unless the petitioner is a qualified mental retardation professional, the court must examine the petitioner under oath to determine whether probable cause exists to continue with the proceeding. KRS 202B.100(5). If probable cause to proceed is found, the court must schedule a preliminary hearing and notify the respondent, his legal guardian and the respondent's spouse, parents or nearest relative about the contents of the petition and the date, time and purpose of the preliminary hearing. KRS 202B.100(6).

The court must also cause the respondent to be immediately examined by two qualified mental retardation professionals, at least one of whom is a physician, who must examine the respondent and certify their findings to the court within 24 hours, exclusive of weekends and holidays. KRS 202B.100(6)(c). The proceeding must be immediately dismissed unless the qualified mental retardation professions certify to the court that the respondent satisfies the criteria for involuntary admission set forth above. KRS 202B.130.

The respondent in the involuntary commitment proceeding has a right to court appointed counsel, KRS 202B.210, the right to be present in person and by counsel at all hearings, KRS 202B.220, the right to present testimony, testify personally and to cross-examine all witnesses, KRS 202B.160(2), the right to a jury trial, KRS 202B.160(2), and the right to appeal the decision of the district court to the state circuit court. KRS 202B.230.

The Commonwealth has the burden of proving each of the criteria for involuntary admission by clear and convincing evidence. KRS 202B.160(2).

A judicial determination that the respondent satisfies the criteria for involuntary admission made pursuant to the involuntary commitment procedure does not guarantee admission to an ICF/MR. The ICF/MR may refuse to admit the respondent if it does not have appropriate programs and space available. KRS 202B.200(2).

If the respondent is admitted to an ICF/MR as a result of the involuntary admission procedure, the appropriateness of the respondent's continued residency is reviewed at least annually by the facility's interdisciplinary team. KRS 202B.240(1). The respondent must be discharged by the facility if the interdisciplinary team determines that the respondent no longer meets the criteria for involuntary admission. KRS 202B.240(2).

The respondent's continued residency in an ICF/MR is also reviewed by the committing district court at intervals of no more than five years. KRS 202B.250(1). In these judicial review proceedings the respondent is entitled to advance notice, appointed counsel, the ability to present evidence and to cross-examine witnesses. KRS 202B.250(1) & (2). Should the court find that the respondent no longer satisfies the criteria for involuntary admission, the respondent must be discharged. KRS 202B.250(3).

If, at any point during the respondent's residency in an ICF/MR, it appears that the respondent no longer meets the criteria for involuntary admission, the respondent, his guardian, family member or attorney may petition the court for an immediate review of the residential placement. KRS 202B.250(4).

The unwarranted admission of a mentally retarded person to one of CHR's facilities is a criminal offense punishable by a fine not exceeding $ 5,000.00 and imprisonment for a term not exceeding five years. KRS 202B.990.

The challenged involuntary commitment procedure recognizes that the persons who would otherwise be responsible for meeting the daily living needs of the retarded person, i.e., legal guardians and immediate family, also have an interest at stake in the commitment proceeding. These other interested parties are specifically permitted to employ expert witnesses, KRS 202B.140, attend all hearings, participate as a party, employ counsel, KRS 202B.160(3), appeal any adverse decision, KRS 202B.230, and seek immediate judicial review of the necessity for continuation of the involuntary commitment at any point during the commitment. KRS 202B.250(4).

Petitioner respectfully submits that the procedures described above accord the mentally retarded who become subject to the involuntary commitment process with all of the procedures required in *Vitek* v. *Jones*, 445 U.S. 480, 495-496, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980).

Moreover, the involuntary commitment procedure adopted by Kentucky represents a fair balancing of the affected private interests, the risk of erroneous deprivation of such interests through the procedures used, the probable value of additional substitute procedural safeguards, and the Commonwealth's interest. *See Parham* v. *J.R.* 442 U.S. 524, 600-601, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979).

The mentally retarded person who has been examined by two qualified mental retardation professionals who both certify that he or she satisfies the criteria for involuntary commitment has an identified need for a level of care that is not available in a community setting. The persons responsible for the care of the respondent, i.e., legal guardian and immediate family, have a legal and moral duty to see that adequate care is provided to meet the needs of the respondent.

All reasonable possible procedural safeguards are contained in the Commonwealth's procedures except for the "beyond a reasonable doubt" standard of proof which this Court has previously determined to be an inappropriate standard in civil commitment proceedings. *Addington* v. *Texas*, 441 U.S.418, 429-430, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979). Additional procedures would not likely serve to reduce the risk of an erroneous decision.

The only interest impinged by the Commonwealth's involuntary commitment procedures is the interest of the Commonwealth. The procedures now contained in KRS Chapter 202B are expensive, time consuming, and divert a significant portion of the public funds which could otherwise be utilized to provide habilitation services to the retarded.

Although the procedures seem needlessly cumbersome, they do provide adequate protection against placement of a mentally retarded person in an ICF/MR who could survive in a less restrictive setting.

4. The Procedures Adopted by Kentucky for the Involuntary Commitment of the Mentally Retarded to Residential Facilities Operated by CHR Do Not Violate Equal Protection.

The District Court has made no finding of facts in this litigation concerning the evidence presented by the parties describing the differences between the mentally retarded and the mentally ill. The specific characteristics of each group relied upon by Petitioner to satisfy Equal Protection review are those characteristics previously recognized by this and other federal courts and so clearly established as to be proper subjects for judicial notice.

Distinguishing between the two groups has not been difficult. However, Petitioner has fallen short of the lower courts' demand that he demonstrate a difference between the mentally retarded and the mentally ill that is rationally related to the purposes of their commitment. *Doe* v. *Austin*, 965 F.2d 109 (1992) (J.A., p. 175).

Prior to the institution of this litigation, CHR did not consider the residents of its ICF/MRs as being "committed" because nearly all residents had been voluntarily admitted upon the substituted consent of their parents or legal guardians. CHR did not realize, until informed by the District Court, that providing a haven of care for mentally retarded persons who could not be cared for in their homes or in their community was an involuntary confinement of the retarded.

The voluntary/medical admission process previously utilized by CHR for admission to its ICF/MRs did not label residents as delinquent, criminal or mentally ill and possibly dangerous, and could not thus generate the stigma and community reaction equated with involuntary hospitalization at a state mental hospital. *See Parham* v. *J.R.*, *supra*, 442 U.S. at 601. There was no showing of any stigma attached to a voluntary admission to an ICF/MR below.

CHR recognized that the residents of its ICF/MRs were, due to their low level of functioning, mentally incapable of expressing a will to leave the residential facilities and often physically incapable of moving at all. (R.69, pp. 4-5). CHR believed that if the mentally retarded were, in any usual sense of the word, "confined" to their ICF/MRs, their confinement was a result of their condition of severe or profound retardation and not as a result of any act of CHR which simply provided facilities for those who could not receive adequate care elsewhere.

It is true that admission to an ICF/MR will, for some, become a long term if not permanent placement. Respite placements of up to 30 days duration without institution of the involuntary commitment procedures contained in KRS Chapter 202B were approved by the respondents and District Court below. (R. 133). The duration of admissions for the retarded can be contrasted with the average hospital stay for psychiatric patents in state mental hospitals of 13.1 days. *Mental Health Weekly*, Vol. 2, No. 11,"Psychiatric Length of Stay by Diagnosis" (1990).

However, the purpose of CHR's operation of its ICF/MRs is not to provide a warehouse for the retarded. The Commonwealth has expended substantial funds to see that all residents of ICF/MRs receive necessary habilitation services. The funds invested in habilitation services in ICF/MRs are justified by the increased independence of the retarded and the decreased cost of providing for their care.

This cost decreases significantly when an ICF/MR resident gains sufficient basic living skills to return to his home or community placement. The periodic administrative reviews conducted within the ICF/MR are designed to determine which residents no longer require residential care. The discharge of such residents creates vacancies for others and permits CHR to meet the residential care needs of the retarded within the Commonwealth with less than 1,000 beds.

The lower courts' mandate that Kentucky treat its mentally retarded with essentially the same procedures provided to its mentally ill has permitted Respondents to successfully argue herein that the Constitution prohibits a person from receiving services from an ICF/MR even though he has been certified by qualified mental retardation professionals as i) being retarded, ii) presenting a danger to himself or others and iii) being unsuitable for a placement any less restrictive than that provided in an ICF/MR; and the Commonwealth has established each of the foregoing factors for involuntary admission in an adversary judicial proceeding by clear and convincing evidence.

Petitioner respectfully submits that the clearly wrong result reached below was due to an improper Equal Protection analysis. The lower courts have failed to recognize that the clear differences between the mentally retarded and mentally ill permit, if not require, the States to tailor the procedures for admission to residential facilities to address the specific needs and interests of each of these clearly distinguishable segments of society.

CONCLUSION

For the reasons set forth herein, Petitioner respectfully requests that the Opinions of the Court of Appeals be reversed.

Respectfully submitted,

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No. 92-351

IN THE

Supreme Court of the United States

October Term, 1992

LEONARD E. HELLER, Secretary,
KENTUCKY CABINET FOR HUMAN
RESOURCES - - - - - - - - Appellant

versus

SAMUEL DOE, by His Mother and
Next Friend, MARY DOE, Et Al. - - - Appellees

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

AMICUS CURIAE BRIEF OF THE CONCERNED FAMILIES OF HAZELWOOD CENTER, ICR/MR, INC., (LOUISVILLE, KENTUCKY), THE PARENTS AND RELATIVES OF OAKWOOD FACILITY, ICF/MR, INC. (P.R.O.O.F.), (SOMERSET, KENTUCKY), THE CONCERNED FAMILIES OF OUTWOOD FACILITY, ICF/MR, INC., (DAWSON SPRINGS, KENTUCKY), AND THE CONCERNED FAMILIES OF CENTRAL STATE HOSPITAL, INC., (LOUISVILLE, KENTUCKY) IN SUPPORT OF THE APPELLANT, LEONARD E. HELLER, SECRETARY, CABINET FOR HUMAN RESOURCES

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QUESTIONS PRESENTED

1. Whether the admissions procedures of state institutional facilities for the severely/profoundly retarded which permit a Court-appointed guardian to voluntarily admit his adult ward for residency and habilitative services violate the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

2. Does the U.S. Constitution's Equal Protection and Due Process Clauses Prohibit a State's legislative enactment of statutes that confer on parents and legal guardians the status of parties to participate in a retarded family member's judicially-supervised admission proceedings to either obtain or maintain a voluntary placement in a state's institutional facility for severely/profoundly retarded adult individuals in need of habilitative services.

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No. 92-351

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

LEONARD E. HELLER, Secretary, KENTUCKY
CABINET FOR HUMAN Resources - - - - *Appellant*

v.

SAMUEL DOE, by His Mother and Next Friend,
MARY DOE, Et Al. - - - - - - - - - *Appellees*

INTEREST OF THE AMICI CURIAE

Counsel for both parties to this case have consented in writing to the filing of this brief and true copies of letters indicating said consent are on file in the Clerk's office of this Court.

The *amicus* parties herein, the Concerned Families of Hazelwood Center, ICF/MR, Inc., the Concerned Families of Outwood Facility, ICF/MR, Inc., the Parents and Relatives of Oakwood Facility, ICF/MR, Inc., (P.R.O.O.F.), and the Concerned Families of Central State Hospital, Inc., are all non-profit, incorporated organizations of parents, guardians, relatives, and friends of severe and profoundly-retarded residents of Kentucky's four (4) institutional facilities for severe and profoundly retarded individuals.

There are 220 severely/profoundly retarded residents living at Hazelwood, in Louisville, Kentucky; there are 50 such residents living in a residential unit of Central State

Hospital, also in Louisville; 420 such residents at the Oakwood facility in Somerset, Kentucky, and 80 such residents at Outwood facility in Dawson Springs, Kentucky. All of said state facilities are "Intermediate Care Facilities for the Mentally Retarded." (ICF/MR)

Three individual members (parents) of the *amici* organizations herein were permitted by the District Court below, on November 16, 1983, to intervene in the instant case as *amicus* parties only (R.95: Order) and throughout the 11-year duration of this case have filed, through counsel, briefs, memoranda, and other pleadings at both the trial court and appellate levels all on behalf of the Appellant's position.

The *amicus* parties file this brief to assert the following positions:

> (1) Despite the trial court's initial certification of Appellees as a class of *all* retarded residents of the state's institutional facilities, and said court's repeated refusal to allow individual members (parents belonging to the *amici* organizations) to intervene in this case as parties, the *amici* steadfastly believe that the Appellees' actual parents/legal guardians more diligently and faithfully represent the true interests of their severe/profoundly retarded family members than the wholly fictitious "Samuel Doe" and his counsel.
>
> (2) The membership of the *amicus* parties deny that their retarded family members are being "committed," "held," "confined," or otherwise placed *involuntarily* in the state's institutional facilities for the severe/profoundly retarded "against their wills" or are being deprived of their Constitutional rights by any unlawful state action, as alleged by counsel for Appellees. Residents of these facilities are free to come and go fairly at will and parents and family members are allowed entrance to the facilities at any time. More importantly, residents may voluntarily and permanently depart the premises of the facilities at any time with little or no notice to administrators. (R. 98: Appendix to Parents' Dec. 16, 1983 *Amicus* brief in District Court below, at pp. 6-11; Affidavit of Thomas Schmitt)

> (3) Parents/Legal Guardians should be allowed to seek the highest quality of care and programs for their severe/profoundly retarded family members in need of such services free of unwarranted and unduly intrusive judicial intervention and scrutiny, whether in an institutional setting or in a "community" placement.

Pursuant to Supreme Court Rule 37(1), the *amicus* parties herein file this brief for the purpose of re-affirming the well-settled Constitutional protection of the family unit. While the *amici* strongly concur with the Appellant's position herein, the Commonwealth's brief may not sufficiently emphasize the role of familial decision-making, *per se*, in the area of maintaining the quality of care and the provision of habilitative services for severe/profoundly retarded, medically-fragile family members. We file this brief to support the sanctity and integrity of the family unit and to deny the unwarranted judicial imposition of an overly-burdensome system that unfairly, unnecessarily, and perniciously divides families and makes Courtroom adversaries of parents and their retarded children.

SUMMARY OF ARGUMENT

Who decides?

That is the summary of amici's argument herein. Who decides the modality of care for a severely/retarded adult family member? The parents/legal guardians/families of that person or the Federal and State Courts in full-fledged adversary admission and "review" proceedings.

Can the Equal Protection Clause be used to pit family members against one another in these proceedings or does it actually *protect* the decision-making role of a family faced with this most emotional and sensitive crisis?

The *amici* would stress that since their members are the legal guardians for their retarded family members, their role in this process is paramount. The Equal Protection Clause cannot be used to strike down state laws that reasonably, legitimately, and fairly attempt to treat mentally retarded citizens "differently" from mentally-ill individuals. All expert proof establishes that the respective conditions are radically different and *require* different treatments.

It is uncontroverted that when all the reviewing Courts and attorneys have concluded with these proceedings, it is the families that have to deal with the aftermath.

The *amici* hope that this Court keeps these points in mind should other national organizations weigh in with their own *amicus curiae* briefs in opposition to the Appellant's position. These organizations cannot speak for us - only our Kentucky organizations of families of retarded citizens represent our true interests as we seek to obtain the best level of care for our retarded family member. In no other state have families of retarded persons had to cope with the labyrinth of marathon Court proceedings in trying to obtain treatment and habilitative services for their retarded family members. No other state legislature or Federal District Court in the nation has enacted a similar system despite the passage of almost seven years since the first opinion in *Doe*.

The families have endured an 11-year nightmare of Federal Court litigation and the ramifications of six (6) different "memorandum"[1] and appellate decisions that have adversely affected their lives of our retarded family members. (See Horton exhibits, at pp. 15a, 21a of Appendix)

Some of the *amici's* families, through individual parents/legal guardians, attempted to intervene as parties at the outset of this litigation in 1982. Each motion by the parents was denied by the trial court. (R. 91, 92; Memorandum Opinion and Order; R. 95: Order)

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[1] No trial, in *Doe*, was ever held in the District Court below complete with any "live" testimony. All testimony was by deposition and rulings were issued pursuant to Appellees' numerous motions for summary judgment.

The *amici* have had to endure Appellees' baseless accusations throughout these proceedings that they (the families) are trying to "involuntarily commit" or "confine" their retarded family members in dungeon-like institutions complete with "loss of liberty" and a "curtailment" of their "Constitutional rights." The Hazelwood, Outwood, Oakwood, and Central State facilities are all rated "superior" by State administrative agencies, have innovative and progressive treatment and habilitative programs, and have absolutely no bars on the windows. The "Constitutional rights" of the residents therein are being no more "curtailed" than those of other individuals living in nursing homes, retirement centers, or other examples of congregate living.

The Due Process and Equal Protection Clauses of the U.S. Constitution, far from denying family prerogatives in this area, actually protect family rights to seek appropriate care, services, and programs for their severely/profoundly-retarded family members.

ARGUMENT

1.

A State Statute That Defines As "Voluntary" a Parent or Legal Guardian's Application for Placement of a Severe/Profoundly Retarded Adult Family Member in a State Institutional Facility For Severely/Profoundly Retarded Individuals Does Not Violate the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution

The 1986 Regular Session of the Kentucky General Assembly passed into law House Bill 477 which amended Kentucky Revised Statute 202B.040 (see Appendix, at p. 2a).

The new statute defined the attempted placement of a severe/profoundly retarded individual in a state institutional facility by that individual's family or legal guardian as "voluntary," and thus immune from the normal judicial "commitment" processes statutorily afforded to mentally ill patients placed, voluntarily or involuntarily, in psychiatric units of mental hospitals.

The District Court below, responding to Appellee's Constitutional challenge of the new act, through the instant case, found the legislation unconstitutional as violative of the retarded individual's due process and equal protection rights under the 14th Amendment. *Doe* v. *Austin*, 663 F.Supp. 597 (W.D., Ky., 1986).

The decision was essentially affirmed by the 6th Circuit Court of Appeals. 848 F.2d 1386 (6th Cir., 1988). This Court declined to grant certiorari. 488 U.S. 967, 109 S.Ct 495, 102 L.Ed.2d 531 (1988).

Certain individual members of the *amici* herein participated in this litigation as *amicus* parties and urged throughout that the law in question passed Constitutional muster.

That this statutory provision ultimately did not survive constitutional scrutiny has led to its logical progeny, the instant appeal before this Court requesting a review of the Kentucky legislature's enactment of statutory amendments to its existing civil commitment laws that attempted (unsuccessfully, so far) to conform said laws to the District Court's original ruling in *Doe*.

The *amici* urge the Court herein to revisit this issue because of its indivisible relation to the issues presented in this appeal. If this Court reverses the lower Courts' rulings and finds that the Kentucky legislature may, constitutionally, confer upon parents/legal guardians the status of parties to fully participate as such in the judicial hearings held to either authorize placement in a state ICF/MR or to review the status of those retarded residents after judicially-approved admission, it should follow that there are no constitutional impediments barring a parent/legal guardian from initially seeking (without prior state court approval) an institutional placement for a severely/profoundly retarded family member in need of such services.

KRS 202B.040(5) stated as follows:

> "The application by parents or guardians for placement for the retarded family member or ward in any mental retardation treatment center shall not be considered an involuntary commitment under this section, provided the retarded family member's application has been evaluated by an interdiscipiinary team as defined in KRS 202B.010 and the subsequent admission fully complies with the provisions of KRS Chapter 202B."

House Bill 477 added to this language, the following new text contained in KRS 202B.045:

> (1) Admission:
>
> (a) Patients shall be admitted only upon the approval of a physician. The facility shall admit only persons who have a physical or mental condition which requires developmental nursing services and a planned program of active treatment;
>
> (b) The interdisciplinary team shall:
>
> 1. conduct a comprehensive evalution of the individual, not more than three (3) months before admission, covering physical, emotional, social, and cognitive factor; and
>
> 2. Prior admission define the need for service without regard to availability of those services. The team shall review all available and applicable programs of care, treatment, and training and record its findings;
>
> (c) If admission is not the best plan but the individual must be admitted nevertheless, the facility shall clearly acknowledge that the admission is inappropriate and initiate plans to actively explore alternatives;

These statutory provisions are *prima facie* proof that gaining admission to a state ICF/MR for a severely/profoundly retarded member is not as simple as checking into a hotel. There are numerous codified checks and balances upon a family's desire in seeking an ICF/MR placement.

In addition, as legal guardians, family representatives charged under state law with a fiduciary duty to care for their retarded family members must comply with a state-court imposed review process of their actions taken on behalf of their ward, primarily through the filing of an Annual Report, which must be completed and then reviewed by a state court ("District") judge for acceptance or rejection. (See KRS 387.670, at Appendix, p. 14a)

Current Kentucky law confers standing on "any interested person" who may compel a state court, after a hearing, to "make any order which the Court deems appropriate and in the best interest of the ward." KRS 387.620(1), (6)(e). (See Appendix, at p. 9a)

With such protective/safeguards already in place, parents/legal guardians should not have to go to trial, with attendant costs, inconvenience, and emotional turmoil, every time they seek to pursue a modality of treatment and care for their severe/profoundly retarded family member. House Bill 477 was merely a legislative attempt to restrict these sensitive family decisions to the venues where they belong: between the families of the retarded individuals and the professionals in the field of treatment of severe/ profound mental retardation.

KRS 202B.040(5) and KRS 202B.045 are clearly consistent with the U.S. Constitution's Equal Protection Clause.

> ". . . to withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose. This standard, we believe, affords government the latitude necessary both to pursue policies designed to assist the retarded in realizing their full potential, and to freely and efficiently engage in activities that burden the retarded in what is essentially an incidental manner."

City of Cleburne v. *Cleburne Living Center*, 473 U.S. 432, at 446, 105 S.Ct. 3249, at 3258, 87 L.Ed.2d 313, at 324 (1985) (footnotes omitted).

Kentucky has satisfied the *Cleburne* test in that there are legitimate governmental interests in treating mentally-retarded and mentally-ill individuals differently as to how members of each group receive treatment.

For the sake of brevity, *amici* will not repeat what the Appellant's brief has stated in detail as far as reciting all the proof that has been adduced at the District Court level as to the undeniable truth that these two maladies are distinctly different, the overriding difference being that mentally-ill individuals, in almost every instance, have the capacity to recover from their illness, while mental retardation is a permanent condition where those afflicted especially at the severe or profound levels often require intensive, permanent treatment and habilitatve services and programs.

The mentally retarded require special and continuing care called "habilitation" to function optimally in society. Habilitation entails "teaching and training the retarded basic life (self-help) and social skills" such as walking, talking, eating, toileting, socializing, using money, traveling and working. Those lessons, however, are not learned permanently - once habilitation ceases, regression occurs. *Philadelphia Police and Fire Assoc. for Handicapped Children, Inc.* v. *City of Philadelphia*, 874 F.2d 156, at 158 (3rd Cir., 1989)

This Court has previously recognized distinctions such as these (retarded versus mentally ill) and approved "different" treatment of these classes of individuals despite Due Process/Equal Protection challenges to said "different" treatment. *Kremens* v. *Bartley*, 431 U.S. 119, 97 S.Ct. 1709, 54 L.Ed.2d 184 (1977); See *Cleburne, supra*, 105 S.Ct. at 3258.

Pure Equal Protection considerations aside, for *amici* herein there is a larger, more fundamental issue at stake. *Amici's* fervent plea is that this Court affirm the well-settled "judicial obligation to respect, if not protect, *parental authority* in decisions relating to general family matters because of the importance of the parental role in family life." *Halderman* v. *Pennhurst*, 707 F.2d 702, at 706 (3rd Cir., 1983) (emphasis added)

In assessing the merits of the challenged sections of the Kentucky legislature's enactment of House Bill 511, in 1990, this Court should also review the prior adverse judicial treatment of that body's 1986 enactment of House Bill 477.

> "Absent a showing of abuse or neglect...the parental right (in chosing treatment plans for retarded family members) remains substantial and may be subject to governmental interference only when such interference is supported by a significant governmental interest." *Halderman, supra*, at p. 709 (3rd Cir., 1983)

2.

Participation of Parents/Legal Guardians of Severely/Profoundly Retarded Family Members, as Parties, in the Judicial Admission/Review Processes to Obtain or Maintain Placement For Said Retarded Family Member In A State Institutional Facility Does Not Violate the Equal Protection Clause of the U.S. Constitution.

The parental role in family matters is "established beyond debate as an enduring American tradition." *Wisconsin* v. *Yoder*, 406 U.S. 205, at 232, 92 S.Ct. 1526, at 1541, 32 L.Ed.2d 15, at 35 (1972).

Except, perhaps, in Kentucky.

The District Court and the Sixth Circuit Court of Appeals have coldly referred to the parents, relatives, and legal guardians of retarded family members as "third parties" whose "interests may be *adverse* to the person facing *commitment*." *Doe* v. *Cowherd*, 965 F.2d 109, at 113 (6th Cir., 1992) (emphasis added)

These "adverse third parties" are in almost every instance the retarded person's natural parents, most of whom are now aged, and assorted family members who have singularly devoted lifetimes to the constant care of severely/profoundly retarded family members.[2]

Amici cannot adequately summarize the dimensions of the devastation visited upon these families in Kentucky by the misguided actions of the Federal Courts below any more succinctly than the testimony of the Horton parents (see Appendix)[3] and the Appellant's accurate assertion that

> "Unlike other States, Kentucky has been forced to stand by as its efforts to provide habilititative services to its needy (retarded) citizens was hamstrung by preliminary injunctions requiring those who would seek such services for the benefit of their mentally retarded sons and daughters march through confusing, complex, unnecessarily expensive and time-consuming procedural obstacles which deter all but the most resolute."

(Appellant's Petition for Writ of Certiorari, at p. 12)

The Kentucky General Assembly's 1990 enactment of amendments to KRS 202B.160(3) and KRS 202B.230 are not violative of the U.S. Constitution.

These legislative enactments provide to parents/legal guardians a "bill of rights" in state judicial admission/review hearings that convene to decide the future (and the location) of a retarded family member's habilitative services.

The challenged provisions permit parents/legal guardians to personally attend these hearings, with legal counsel, and to participate in same by calling their own witnesses and appealing any decision they deem adverse to the interests of their retarded son or daughter.

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[2] To see first-hand a glimpse of the effects of the *Doe* decisions, see Appendix herein, specifically the testimony of Mr. & Mrs. Thomas Horton, parents of Tracy, their profoundly-retarded adult daughter.

[3] The Hortons are residents of Louisville and were the first parents/guardians to undergo the endless court proceedings, set up under *Doe*, to have their profoundly retarded daughter, Tracy, admitted to the Hazelwood Center in Louisville.

As the Horton case vididly demonstrates, without an express enumeration of these rights, parents and guardians are literally powerless to try to protect, in Court, the *true* interests of their retarded family members during the hearings but are *totally responsible* for carrying out the ultimate mandate of the reviewing state court.

If the rulings of the lower Courts herein are affirmed, *amici* will be effectively stripped of the perogatives vested in them by the state courts as the legal guardians for retarded family members pursuant to KRS 387.660, which sets out in great detail the responsibilities of a guardian including, but not limited to,

> "establishing his place of abode within the state...and to make provision for the ward's care, comfort, and maintenance and arrange for such education, social, vocational, and rehabilitation services as are appropriate and as will assist the ward in the development of maximum self-reliance and independence." KRS 387.660(1), (2) (See Appendix, at p. 12a)

Other key provisions of Kentucky guardianship law recognize the fundamental, vital role of parents/legal guardians in the care of their retarded family members. KRS 210.270 sets out detailed procedures mandating that state officials notify the parents/guardians of retarded family members residing in state ICF/MR facilities if that retarded family member's level of care is to be changed or if that person is being considered for re-classification and movement out of the facility. Significantly, parents/legal guardians are not given a "veto" power over such decisions but are entitled to appeal same through administrative levels and, ultimately, to a state Court.

Amici submit that, far from being violative of the U.S. Constitution, this statutory provision (like the challenged legislative acts herein) *enhance* and complement the parents/legal guardian's fiduciary responsibilities and assist them to *comply with the state laws* that *strictly* regulate their conduct as legal guardians.

Again, to reiterate, the state's legislative establishment of two different systems for providing care and treatment of severely/profoundly retarded individuals and for mentally ill people is based on the acknowledged fact that mentally ill individuals may, and in almost every instance do recover from their illness or at least control same with medication. The daunting task before legal guardians of retarded individuals is that their fiduciary duties will *never* end, because retardation afflicting their family member is a *permanent* condition that can, with intensive, unremitting habilitative services, only be abated incrementally, if at all.

That is precisely why the parents/legal guardians need to be involved, as parties if necessary, in any judicial proceeding determining the course and scope of that retarded individual's future care and treatment and in what location or setting.

What the lower Federal Courts have actually done, pursuant to Appellees' meritless challenges, is to violate the due process rights of the parents/legal guardians to make family decisions for their retarded son or daughter. These "family rights of personal choices" are protected by the Due Process Clause of the 14th Amendment. *Cleveland School Board* v. *LeFleur*, 414 U.S. 632, at 639-640, 94 S.Ct. 791, at 796, 39 L.Ed.2d 52, at 57 (1974).

The legislative provisions of House Bill 511, adopted by the 1990 Kentucky General Assembly, only give the parents or legal guardians an opportunity to insure that all of the permissable, relevant, and available evidence is submitted to an *independent* decision-maker and to seek review of any decision which is not consistent with that evidence.[4] Such modest participation of retarded individual's parents or legal guardians does not impact upon or violate the lower Courts' previous rulings in interpreting the constitutionality of the state's admission procedures to state ICF/MR facilities. The challenged statutes do not provide the parents/legal guardians with a "veto" over any decision affecting their retarded family member, they merely allow the parents/legal guardians to *participate* in the process.

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[4] As the Horton case attests, these "rights" are desperately needed by the families undergoing the fairly frequent Federal Court-imposed admission/review proceedings in the state courts.

> ". . . our precedents permit the parents to retain a substantial, if not the dominant role in the (voluntary commitment) decision...and that the traditional presumption that the parents act in the best interests of their child should apply." *Parham* v. *J.R.*, 442 U.S. 584, at 604 99 S.Ct. 2493, at 2505, 61 L.Ed.2d 101, at 120 (1979)

3.

The Kentucky General Assembly Has Wide Latitude Under the U.S. Constitution to Allocate Fiscal Resources and Establish Programs/Habilitative Services for Severely/Profoundly Retarded Citizens Residing in the Commonwealth of Kentucky.

Twice in the last six years, membership of the *amici* have requested that their elected state legislators address the Constitutional "problems" (as defined by the Federal District Court below) attendant to their seeking institutional placements for their medically-fragile, severely/profoundly retarded family members.

On both occasions, the Kentucky General Assembly attempted to address these concerns by enacting legislation - House Bill 477 in 1986 and House Bill 511 in 1990. Each time the legislature acted after holding committee meetings, hearing live testimony, having floor debates and, after considering all the evidence, passed the legislation now challenged herein, by nearly unanimous margins in each House thereof.

It is uncontroverted that this Court has long-recognized, favorably, the prerogatives of the legislative branch of a

state's government to address a wide and limitless range of public interest issues. This tradition dates at least to the time of Justice Brandeis' classic assertion that "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co.* v. *Liebman*, 285 U.S. 262, at 311, 52 S.Ct. 371, at 386-387 76 L.Ed. 747, at 771 (1932) (Brandeis, J., dissenting)

In more recent times, the Court has wisely admonished that

> "How this large and diversified group (of retarded individuals) is to be treated under the law is difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not by perhaps ill-informed opinions of the judiciary..."
>
> ". . . Especially given the wide variation in the abilities and needs of the retarded themselves, governmental bodies must have a certain amount of flexibility and freedom from judicial oversight and limiting of their remedial efforts..." *City of Cleburne* v. *Cleburne Living Center*, 473 U.S. 432, at 442-443, 445, 105 S.Ct. 3249, at 3256-3257, 87 L.Ed.2d 313, at 322-324 (1985)

"Judicial oversight" in this case, for its 11-year duration, has been nothing less than suffocating. Years of work on these sensitive issues by the legislative branch in Kentucky have been unjustly voided upon Appellees' successful Constitutional challenges.

This is precisely the opposite result intended by the aforementioned holdings of this Court, which have decided that states have a legitimate *parens patriae* power in providing care to its citizens who are unable to care for themselves. *Addington* v. *Texas* 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979)

The *Parham* case termed the state's interest in caring for its retarded citizens as "significant." *Parham* v. *J.R.*, 442 U.S. 584, 99 S.Ct 2493, 61 L.Ed.2d 101 (1979).

The legislative branch is where "the public makes democratic choices among alternative solutions to social and economic problems" over which the Courts exercise "properly" only "a limited review power." *Schweiker* v. *Wilson*, 450 U.S. 221, at 230, 101 S.Ct. 1074, at 1080, 67 L.Ed.2d 186, at 195 (1981).

In a democracy, issues pertaining to sensitive policy choices are to be resolved by the legislature. *Harris* v. *McRae*, 448 U.S. 297, at 325, 100 S.Ct. 2671, at 2698, 75 L.Ed.2d 784, at 811 (1980), quoting *Maher* v. *Roe*, 432 U.S. 464, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977).

This Court has traditionally respected a presumption in favor of a state's action in cases involving "social or economic legislation." *Kadrmas* v. *Dickinson Public Schools*, 487 U.S. 450, at 462, 108 S.Ct. 2481, at 2490, 101 L.Ed.2d 399, at 412 (1988). The presumption imposes upon challengers the heavy burden of making a "clear showing of arbitrariness and irrationality" in order to overturn the legislation. *Hodel* v. *Indiana*, 452 U.S. 314 at 331-332, 101 S.Ct. 2376, at 2387, 69 L.Ed.2d 40, at 55 (1981). Within this context, a statutory classification violates the equal protection clause "only if the statute's classification rests on grounds wholly irrelevant to the achievement of the State's objective." *Kadrmas*, 108 S.Ct. at 2489 (quoting *Holt Civic Club* v. *Tuscaloosa*, 439 U.S. 60, at 71, 99 S.Ct. 383, at 390, 58 L.Ed.d2d 292, at 302 (1978).

> "We will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purpose that we can only conclude that the legislature's actions were irrational." *Vance* v. *Bradley*, 440 U.S. 93, at 97, 99 S.Ct. 939, at 943, 59 L.Ed.2d 171, at 176 (1979)

The "heavy burden" facing the Appellees in *Doe*, therefore, is to prove that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the "governmental decisionmaker." *Ibid*, at 111, 99 S.Ct. at 949, 59 L.Ed.2d, at 184.

Both Sixth Circuit opinions in *Doe* have failed to adhere to this standard of equal proection analysis. In a case similar to *Doe*, the Fifth Circuit Court of Appeals applied the standard correctly in *Lelsz* v. *Kavanaugh* when it held that "in determining whether the state has met its obligations in these respects (programs for the retarded), decisions made by the appropriate professional are entitled to a presumption of correctness." *Lelsz* v. *Kavanaugh*, 807 F.2d 1243 (5th Cir., 1987), citing Youngberg v. Romeo, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982)

In its legislative findings, and subsequent enactment of laws related thereto, the Kentucky General Assembly has scrupulously adhered to the *Lelsz* standard and established that sufficient differences do exist between the mentally ill and the mentally retarded that constitutionally permit said legislative body to codify the differing procedures for the admission to state facilities of those two classifications of affected citizens free from unilateral, judicial fiats striking down said classifications as violative of the U.S. Constitution's Equal Protection Clause.

CONCLUSION

For all the foregoing reasons, the decisions of the Sixth Circuit Court of Appeals and the U.S. District Court below should be reversed insofar as said decisions invalidated the legislature's 1986 amendments to KRS 202B.040(5) and its 1990 enactment of KRS 202B.160(3) and KRS 202B.230.

The *amicus* parties herein would therefore join with the Appellant and ask for the identical relief requested in the Commonwealth's brief.

In sum, the *amici* strenuously deny that any of their retarded family members currently living at one of the state's institutional facilities are being "confined," "held," "committed," or otherwise being deprived of the U.S. Constitution's guarantee of equal protection of the law. The legislative acts challenged herein by counsel for the Appellees *complement* and *strengthen* the role of the family vis' a vis' the care and well-being they are morally obligated to provide and maintain for their profoundly-retarded loved ones.

Respectfully submitted,

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December 3, 1992

APPENDIX

LIST OF AMICI

1. Mrs. Louise Underwood
   President, Concerned Families of Hazelwood Center, ICF/MR, Inc.
   3129 Bank Street
   Louisville, Kentucky 40212

2. Mrs. Virginia Linton
   President, Concerned Families of Outwood Facility, ICF/MR, Inc.
   P.O. Box 144
   Princeton, Kentucky 42445

3. Mrs. Nora Putnam
   President, Parents and Relatives of Oakwood Facility, ICF/MR, Inc.
   683 Elsmere
   Lexington, Kentucky 40503

4. Mrs. Mary Kraeszig
   President, Concerned Families of Central State Hospital, ICF/MR, Inc.
   8812 Tranquil Valley Lane
   Louisville, Kentucky 40299

KRS 202B.040(5)

"The application by parents or guardians for placement for the retarded family member or ward in any mental retardation treatment center shall not be considered an involuntary commitment under this section, provided the retarded family member's application has been evaluated by an interdisciplinary team as defined in KRS 202B.010 and the subsequent admission fully complies with the provisions of KRS Chapter 202B."

KRS 202B.045

(1) Admission:

(a) Patients shall be admitted only upon the approval of a physician. The facility shall admit only persons who have a physical or mental condition which requires developmental nursing services and a planned program of active treatment;

(b) The interdisciplinary team shall:

1. conduct a comprehensive evalution of the individual, not more than three (3) months before admission, covering physical, emotional, social, and cognitive factor; and

2. Prior admission define the need for service without regard to availability of those services. The team shall review all available and applicable programs of care, treatment, and training and record its findings;

(c) If admission is not the best plan but the individual must be admitted nevertheless, the facility shall clearly acknowledge that the admission is inappropriate and initiate plans to actively explore alternatives;

202B.160. Hearing procedures. — Rights of guardians and immediate family members.

* * * * * * *

(3) Guardians and immediate family members of the respondent shall be allowed to attend all hearings, conferences or similar proceedings; may be represented by private counsel, if desired; may participate in the hearings or conferences as if a party to the proceedings; may cross-examine witnesses if desired; and shall have standing to appeal any adverse decision. (Enact. Acts 1990, ch. 147, § 15, effective July 13, 1990.)

* * * * * * *

202B.230 Appeals — Manner — Parties who may appeal. — Appeals from the final orders or judgments of the District Court made and entered in proceedings under this chapter shall be taken in the manner as other appeals from District Court to Circuit Court. Appeals may be taken by the Commonwealth, the individual who is subject to the proceedings, or the individual's guardian, limited guardian, or other authorized representative. This appeal shall be advanced on the Circuit Court docket without motion or notice.

* * * * * * *

210.270. Custodial care of mental patients in private homes, private nursing homes and private institutions — Transfer or reclassification of patient — Procedure. — (1) The secretary of the cabinet for human resources is authorized to designate such private homes, private nursing homes and private institutions as he shall deem, after a thorough investigation of the personal and financial qualifications of the owners and tenants, the facilities and management, and the desirability of the location of such homes, to be suitable for the placement of patients, including the mentally ill and mentally handicapped and retarded of all ages, outside of the state mental hospitals. The secretary of the cabinet for human resources is authorized to prescribe, from time to time by regulation, standards for the selection and operation of private homes, private nursing homes and private institutions designated for the placement of patients. No home of an officer or employee of the cabinet for human resources or of a member of his immediate family shall be designated for the placement of patients.

(2) Whenever the staff of a state mental hospital has determined that a patient who is not being held on an order arising out of a criminal offense has sufficiently improved and is not dangerous to himself or other persons, and that it would be in the patient's best interest to be placed outside of the hospital in a private home or private nursing home, the hospital shall so certify and authorize the patient to be transferred to a designated private home or private nursing home for care and custody for such length of time as the hospital deems advisable.

(3) No mentally retarded patient lodged in a state institution may have his level of care reclassified nor may he be transferred to a private nursing home or other private institution without first providing ten (10) days' notice by certified mail return receipt requested to the patient's parents or guardian that a reclassification of the patient's level of care or a transfer in the place of residence is being considered.

(4) Any parent of guardian of any mentally retarded patient lodged in a state institution may participate in any evaluation procedure which may result in a reclassification of such patient's level of care or in a transfer in the place of residence of such patient. Such participation may include the submission by the parents or guardian of medical evidence or any other evidence deemed relevant by the parents or guardian to the possible reclassification or transfer of such patient.

(5) If the decision to reclassify or transfer any mentally retarded patient is adverse to the best interests of such patient as expressed by the parents or guardian, they shall be given notice by certified mail return receipt requested that they are entitled to a thirty (30) day period from the receipt of such notice to file with the secretary of the cabinet for human resources a notice of appeal and application for a hearing.

(6) The appeal shall be heard by a three (3) member panel composed of a designated representative of the cabinet for human resources, a designated representative of the state institution where the mentally retarded patient is presently lodged, and a designated neutral representative appointed by the county judge/executive wherein the institution in question is located.

(7) Decisions made by the panel may be appealed, within thirty (30) days from the date of decision, to the circuit court of the county wherein the state institution in question is located, to the circuit court of the county wherein either of the parents of guardians or committee of the patient in question is domiciled at the time of the decision, or to Franklin Circuit Court.

(8) All parents or guardians or committee of a mentally retarded patient lodged in a state institution shall be fully apprised by the cabinet for human resources of their rights and duties under the provisions of subsections. (3), (4), (5), (6), and (7) of this section.

(9) The provisions of KRS 210.700 to 210.760 shall apply to patients transferred to designated private homes and private nursing homes as though such patients were residing in a state mental hospital.

* * * * * * *

387.620. Petition for relief — Hearing on petition — Judgment or modification. — (1) A partially disabled or disabled person, his limited guardian, guardian, limited conservator, or conservator, or any other interested person may petition the court for:

(a) Termination or modification of an order of partial disability or disability;

(b) Removal and/or replacement of a limited guardian, guardian, limited conservator, or conservator; or

(c) Renewal of the appointment of the limited guardian, guardian, limited conservator, or conservator.

(2) Petitions pursuant to this section shall set forth:

(a) The name, address of the ward;

(b) The name, address of the limited guardian, guardian, limited conservator, or conservator;

(c) The name, address and interest of the petitioner;

(d) The names and addresses of the ward's next of kin, if known;

(e) The name and address of the individual or facility, if any, having custody of the ward;

(f) The relief requested; and

(g) The facts and reasons supporting the request.

(3) A request under subsection (1) of this section, if made by the ward, may be communicated to the court by any means, including, but not limited to, oral communication or informal letter. If such a request is communicated by means other than a petition, the court shall appoint a suitable person who may, but need not be, an employee of the state, county, or court to prepare a written petition to be filed with the court within seven (7) days following the appointment.

(4) Within thirty (30) days after the filing of a petition, the court shall conduct a hearing at which the ward shall

be entitled to counsel. The time for a hearing may be extended by the court, on motion of either party, for cause. Notice of the time and place of the hearing shall be given by the clerk of the court not less than fourteen (14) days prior to the hearing to both parties and all persons named in the petition. The petitioner shall, upon his motion, be entitled to have the motion for termination or modification determined by a jury.

(5) At the request of any party or on its own initiative, the court may order an interdisciplinary evaluation of the ward. The time period in which the court must review a petition may be extended for an appropriate period of time if an evaluation is ordered by the court. The interdisciplinary evaluation report may be filed as a single or joint report of the interdisciplinary evaluation team, or it may otherwise be constituted by the separate reports filed by each individual of the team. If the court and all parties to the proceeding and their attorneys agree to the admissibility of the report or reports, the report or reports shall be admitted into evidence and shall be considered by the court.

(6) Upon conclusion of a modification hearing without a jury, the court shall enter a written order setting forth the factual basis for its finding and may do any of the following:

(a) Dismiss the petition;

(b) Remove the guardian or conservator and dissolve the guardianship or conservatorship order;

(c) Remove the limited guardian, guardian, limited conservator, or conservator and appoint a successor;

(d) Modify the original guardianship or conservatorship order; or

(e) Make any other order which the court deems appropriate and in the best interest of the ward.

(7) If the original order is dissolved and no further order is issued, the ward shall be relieved of all legal disabilities. The court shall enter an order and judgment restoring to the person all of the rights and privileges of a citizen. The clerk shall note the judgment or modification in the book in which notices of actions and encumbrances are indexed.

(8) The clerk of the court shall transmit a certified copy of the restoration judgment or modification to the originating court, if the judgment or modification is ordered by a court other than the court in which the original judgment was entered.

* * * * * * *

387.660. Specific powers and duties of guardian. — A guardian of a disabled person shall have the following powers and duties, except as modified by order of the court:

(1) To take custody of the ward and to establish his place of abode within the state, except that, if at any time a guardian places a ward in a licensed residential facility for developmentally disabled persons, the guardian shall within thirty (30) days of such placement, file with the court notice of the placement, stating with specificity the reasons for such placement, and an interdisciplinary evaluation report detailing the social, psychological, medical or other considerations on which such placement is predicated, a description of the treatment or habilitation programs which will benefit the ward as a result of such placement, and a determination that such placement will provide appropriate treatment in the least restrictive available treatment and residential program. For purposes of this subsection, the interdisciplinary evaluation report may be one performed within two (2) months prior to the placement for purposes of determining whether such placement is necessary and appropriate, or may be an evaluation and assessment provided by the residential facility immediately after placement. Notice to the court shall not be required where the ward is transferred from one licensed residential facility to another.

(2) To make provision for the ward's care, comfort, and maintenance and arrange for such educational, social, vocational, and rehabilitation services as are appropriate and as will assist the ward in the development of maximum self-reliance and independence.

(3) To give any necessary consent or approval to enable the ward to receive medical or other professional care, counsel, treatment or service, except that a guardian may not consent on behalf of a ward to an abortion, sterilization, psychosurgery, removal of a bodily organ, or amputation of a limb unless the procedure is first approved by order of the court or is necessary, in an emergency situation, to preserve the life or prevent serious impairment of the physical health of the ward.

(4) To act with respect to the ward in a manner which limits the deprivation of civil rights and restricts his personal freedom only to the extent necessary to provide needed care and services to him.

(5) To expend sums from the financial resources of the ward reasonable and necessary to carry out the powers and duties assigned to him by the court and, unless a separate conservator has been appointed, to manage the financial resources of this ward.

If a separate limited conservator or conservator has been appointed for the ward, the expenditure of funds by the limited guardian shall be consistent with the duties assigned to and procedures and policies established by such limited conservator or conservator. Conflicts arising between a limited guardian and a limited conservator regarding the expenditure of funds which are unable to be otherwise resolved shall be submitted to the court for resolution. (Enact. Acts 1982, ch. 141, § 17 , effective July 1, 1982.)

387.670. Annual report of guardian. — (1) A guardian shall file with the court at least annually a verified report stating:

(a) The ward's current mental, physical, and social condition;

(b) The address of every residence of the ward during the reporting period and length of stay at each residence;

(c) A summary of the medical, social, educational, vocational, and other professional services received by the ward during the reporting period;

(d) An outline of the guardian's visits with and activities on behalf of the ward;

(e) A recommendation as to the need for continued guardianship;

(f) A statement signed by the standby guardian, if one has been appointed, that the standby guardian continues to be willing to serve in the event of the death, resignation, removal, or incapacity of the guardian; and

(g) Other information requested by the court or useful in the opinion of the guardian.

(2) For the purpose of filing the report required by subsection (1) of this section, the guardian shall be given access to records pertaining to the ward held by public or private agencies which contain information necessary for the guardian to perform his duties.

(3) The court shall review the report required in subsection (1) of this section and take whatever action it considers necessary to enhance the well-being of the ward.

(4) In addition to the requirements of this section, a guardian shall comply with the reporting requirements of KRS 387.710 unless a separate conservator has been appointed. (Enact. Acts 1982, ch. 1441, § 18, effective July 1, 1982.)

* * * * * * *

TESTIMONY OF MRS. SHARON HORTON

Kentucky General Assembly
House Judiciary Committee
February 15, 1990

"Mr. Chairman, Ladies and Gentlemen: I am Sharon Horton from Louisville. I am convinced that the majority of untoward things which happen to us are brought about by benevolent, well-intentioned people.

I hope you will take a few moments to listen to the following story of how my husband and I have been overwhelmed — and we believe abused — by statute 202B.

Our first child, Tracy, was born in 1965 and is now 25 years of age. When she was one year old she was diagnosed as being profoundly mentally retarded and handicapped.

Tracy's health, always very frail, started deteriorating rapidly in 1984 when she was 19 years of age. She suffered frequent pneumonia, chronic bedsores, severe skin allergies, congestive heart failure, swollen limbs and weight loss. To fully understand her health problems you must know that Tracy has a mental age of three months and that she does not walk, talk, toilet, dress, bathe or feed herself. Simply stated, she has needed unremitting 24-hour care for her entire life.

In 1985, frightened and overwhelmed by her health problems, we applied to have her admitted to Hazelwood. A Seven Counties social worker visited our home and started the lengthy admissions process. We were instructed to petition the court to have Tracy declared totally and permanently disabled and have myself named as her legal guardian. The jury trial was held in guardianship court in November, 1985. We were not prepared for what we encountered and were not aware that we would be "prosecuting" our child. It was an extremely painful proceeding which should have been a clue as to what would follow.

The admissions process ground on. Tracy had to be analyzed by a committee here in Frankfort, we had to take her to a social worker, then a psychiatrist, then a physician etc. Finally we were informed in late 1986 that she was approved for admission to Hazelwood and that she was first on the waiting list. After an agonizing delay we were told that due to a "new law" Tracy would have to undergo a series of jury trials prior to her admission, worse, no one was able to answer any of our questions because Tracy was apparently the first to come through the system under this "new law". We were guinea pigs, and we were thrust into the courts unprepared and uninformed. The one thing we did learn was that my status as Tracy's legal guardian counted for nothing, and that the traumatic guardianship trail we had undergone was a totally wasted exercise.

In the summer of 1987, we were dragged through a probable cause hearing, a 60-day commitment trial and a 360-day commitment trial. Finally the process mercifully ended and Tracy was admitted to Hazelwood. The ordeal of being pitted against our own child in an adversary proceeding — in repeated jury trials —— took a heavy toll on us and left us emotionally battered. In the following months, Tracy flourished in Hazelwood's environment. We do not pretend that Hazelwood is right for everybody, but it is right for a select group who need the special services provided there. During the relatively short time Tracy has been there her weight has increased from 69 to 117 pounds, an increase of 70 percent. While her physical condition remains very fragile, we are convinced that Hazelwood saved our daughter's life.

Again in the summer of 1988 we were dragged through the court system again. There was another probable cause hearing and another 360-day commitment trial. This time, the public defender implored the jury to disregard a mountain of testimony about how much Tracy needed and benefited from Hazelwood's medical services. The jury, with an attorney serving as foreman, ordered her discharged. The verdict defied all the evidence and all logic.

We requested an appeal. Only then did we learn — for the first time — that as parents/guardians we had no standing in these proceedings and were not recognized as legitimate parties. Therefore, we had no "platform" from which to appeal. A verdict had been reached which would have an enormous negative impact on our child for the rest of her life, and we had no legal basis to contest it.

At great personal expense we hired an attorney to represent us. The Hazelwood management, obviously acting on instructions of cabinet attorneys, informed us that if we failed to remove our daughter by the court-ordered date they would initiate "abandonment" proceedings against us. We rhetorically asked them how one could abandon an adult? We further inquired how it came to pass that as Tracy's parents and legal guardians we had no rights and no standing when we sought to place her in Hazelwood, yet we could be prosecuted for failing to remove her?

Our attorney than petitioned the guardianship court to hear our plea; his rationale was that as Tracy's guardians we were bound to comply with the rules handed down by that court regarding strict responsibility for Tracy's care and well-being, and for the submission of annual reports which are reviewed and approved by the court. The judge disallowed our motion, saying he could not overrule another district judge. But before doing so, he made a number of very interesting statements, for example, A) He wondered what is the difference between Tracy and a man with Alzheimer's disease, whose wife can no longer handle him and seeks to place him in a nursing home? Is this not an involuntary commitment? Should he not have a jury trial before being committed? B) He asked who is to say that Tracy would not oppose being removed from Hazelwood and returned to our home? Who is to say that this is not an involuntary act as far as she is concerned? Who is to say that our home is not more restrictive than Hazelwood? C) He said he agonized over this decision for a week. As legal guardians we had fully complied with his court's orders to take proper care of our daughter and we had in fact subjected her to an annual judicial review by his court. D) He said this law is unworkable and simply must be amended. In dismissing our pleas, he said "For what it's worth, I think my decision stinks." In striving to be brief we have omitted a great deal. Tracy remains in Hazelwood today because we fought the system to a temporary draw. We have withstood 15 trials and/or hearings on Tracy's commitment in the last 19 months. Speaking from personal experience, this entire process is terribly flawed and we submit to you the following observations:

1) The law assumes that parents who seek to commit a child have sinister motives, and that the child must be protected from the parents. This is an outrage, and we believe the law should assume the opposite. With the investigative resources available to the courts, parents could be thoroughly checked out in a few days —schools, neighbors, police, church, social agencies, physicians, employers etc. Past improprieties would quickly surface during a reasonably thorough investigation. In the absence of evidence to the contrary, the parents should be considered to be loving, caring and well-motivated and should not be treated like criminals.

2) The present and future well-being of severely retarded children is much too important to be decided by uninformed lay people, and the juries should be abolished.

The medical testimony is extremely complicated, and this is a matter for only doctors, medical specialists and a judge.

3) We strongly resent and disagree with Tracy's being treated as an adult. She is a three-month old baby in a 25 year old body. Had we admitted her to Hazelwood prior to her 18th birthday we would have been spared much of this grief. By keeping her at home as long as possible, we opened ourselves up to this legal assault.

We do not oppose judicial review of our daughter's stay at Hazelwood: periodic review is a safeguard of Tracy's constitutional rights which will become even more important when her father and I are no longer living. We do, however, oppose annual trials, we oppose jury trials, and we oppose attorneys who use these proceedings as a forum to promote their own social agendas by putting the parents on trial.

A judicial review every three to five years is sufficient for profoundly retarded children, whose progress is measured in millimeters.

5) What these unnecessary trials are costing the commonwealth in time, salaries and judicial resources should be of great concern to you. Tracy's most recent trial lasted two days and tied up a courtroom, a judge, a recorder, bailiffs and several lawyers. In addition, Hazelwood tied up a van, two aides, a social worker, a nurse and a psychologist, all of whom were in court for two days.

Something must be done to correct a system which seems out of control and which is bringing irreparable harm to the very people it is intended to help. There is something terribly wrong with a system which permits a public defender to repeatedly admonish a jury that they absolutely may not and must not permit "what's best for Tracy" to enter into their deliberations. We beg you, our lawmakers, to take up this challenge and do "what is best" for the Tracy Hortons of the Commonwealth.

We thank you for permitting us to state our case and ventilate our anger and frustration.

Thank you very much, Mr. Chairman."

(R. 202: Appendix to Parents' June 14, 1990 *Amicus* Brief in District Court below, at pp. 9a-17a).

LETTER TO THE EDITOR OF MR. THOMAS HORTON, LOUISVILLE *COURIER-JOURNAL*
JUNE 10, 1989

". . . Parents' 'ordeal'

Your May 22 story and follow-up editorial about our daughter Tracy shed light on the continuing controversy over the care of the retarded. However, we feel they did not sufficiently illuminate the cruel hoax currently being played upon the parents of those children.

The final chapter of the Tracy Horton tragedy is yet to be written. Sometime soon, various and sundry judges and lawyers will decide her fate. The opinions of her parents, doctors and nurses, i.e., her care-givers, will neither be solicited nor considered.

Tracy's is not only the story of the failure of our judiciary and government to meet the critical needs of our retarded children; it is the story of the abrogation of our long-standing commitments to them. It is the story of our unfortunate capacity to inflict harm upon those in need, all in the name of helping them.

Tracy was profoundly retarded at birth. Not unlike modern parents, we would have preferred a perfect baby; however, we accepted her as a gift to us and set about to rear her as we were given the right to do so. All of the doctors who examined her urged us to institutionalize her right away in order to spare us heartache later on. We would not consider it. Tracy was part of our family, and we vowed to care for her for as long as possible, a promise we were able to keep for 22 years. In contemplating our recent devastation at the hands of the court system, we would not counsel other parents to follow our example.

Rearing Tracy was extremely difficult, but no one promised us it would be easy. Community resources were practically nonexistent, and sources of respite workers always dried up by the time we learned of them. Parents of retarded children quickly learn that it is easier to stay home than to suffer the frustration of finding sitters, who tend to back out when they learn the child is retarded. Parenting such a child requires enormous sacrifice, but the reward comes with the special bonding that occurs between parents and child — a bonding that the courts apparently do not value.

As your article noted, Tracy has no selfhelp skills whatever and has required unremitting care during her entire life. Compounding those problems in recent years, her always-frail health deteriorated dramatically. She was in a downward spiral, which we could not reverse. A range of medical problems such as hers requires ongoing professional care, which distraught parents are ill-equipped to administer. Over time, and after more than one death watch, we reluctantly concluded that she would not survive if she remained at home.

Fortunately, the people of Kentucky — in their goodness — have put programs and facilities like Hazelwood in place to care for our retarded children. These facilities could be much better, but they exist and they do a creditable job with the meager resources available to them. We began the agonizing process to have Tracy admitted. The procedure for evaluating her need for Hazelwood's services, and her qualifications for admission, were extensive and thorough. But as tedious as the process seemed, it was carried out with a high degree of compassion and sensitivity. This sympathetic treatment 'validated' our long-held belief that if we did the best we could for our child for as long as possible, the system would reach out to us in out time of need. Our naive faith in the system would soon be shattered.

The experts determined that Tracy met every requirement for admission, and after several months she was first

on the waiting list. Up to this point the system had worked splendidly. Careful evaluation had ensured that she truly needed Hazelwood's special services, an assurance that the taxpayers are entitled to.

Suddenly, the court changed the rules. We learned that parents who seek to admit their child to an institution would now be assumed to have alterior motives. The court would appoint a lawyer to "protect" the child from the parents. Two jury trials would be required annually thereafter. The parents would be given no standing in the proceedings other than as spectators, and their rights as legal guardians would be discarded. If the parents believed that the jury verdict was harmful to the child's health and well-being, they would have no right of appeal. If the parents had questions, there would be no answers. If the parents needed legal assistance, none would be available.

The spirit of compassion that we had experienced previously now evaporated with the new legal requirements, and we were greeted in court with hostility and scorn that shocked our sensibilities. The jurors were warned that they would be derelict in their duty if they arrived at their decision by considering "what is best for Tracy." Referring to the mother who has fed Tracy more than 25,000 meals — one spoonful at a time — the public defender repeatedly portrayed her to the jury as an uncaring parent who was seeking to lock her child away in a dreary institution and forget about her.

The ordeal of being pitted against our own daughter in an adversary proceeding — in endless jury trials — left us emotionally devastated. We would not comprehend how a legal system could inflict this kind of pain on the parents of retarded children. We commenced our journey through the courts racked with guilt and brokenhearted about "giving up" our daughter, and frightened for her future safety, and then found ourselves battered in trial after trial by a system that we had turned to for help. Is it no wonder that parents of retarded children feel so helpless and isolated?

Profoundly retarded children are the single most disfranchised group in our society, and as such they deserve every consideration we give them. Those who can function in the community should be given the opportunity to do so. Those, like Tracy, with ongoing medical problems and those who need the protection of a sheltered environment should have appropriate facilities made available to them. We parents of these children have a genuine need to rear them ourselves if we are capable, and after doing so we do not expect you to summon us to the courthouse and pin medals on us; however, neither do we expect you to haul us into the courthouse and bludgeon us.

Those who act as if winning a case were more important than allowing a sick child to receive medical care, those who oppose our will regarding our retarded child's health and safety, those who implore juries to disregard all medical testimony, and those who contend that they — and not the parents — know what's best for her, say that they are doing so to protect her civil rights. We parents, on the other hand, want desperately to protect her life. Tracy seemingly cannot be permitted to have both.

/s/ Tom Horton
Louisville, Kentucky 40223"

(R. 202: Appendix to Parents' June 14, 1990 *Amicus* brief in District Court below, pp. 18a-21a)

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No. 92-351

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October Term, 1992

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Petitioner,

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Respondents.

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To The United States Court Of Appeals
For The Sixth Circuit

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BRIEF OF THE STATES OF NEW JERSEY, INDIANA, MICHIGAN, MINNESOTA, NEBRASKA, SOUTH DAKOTA AND VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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◆

INTEREST OF THE AMICI CURIAE

The state *amici* have a significant and vital interest in providing for care or habilitative services to their mentally ill and mentally retarded residents. The questions posed in this case -- whether hearings requiring proof "beyond a reasonable doubt" are constitutionally mandated prior to institutionalizing mentally retarded persons and whether parents and legal guardians may participate in procedures regarding institutional placement of mentally retarded persons -- are important to the administration of these states' laws relating to these two distinct groups of individuals and to the allocation of limited resources to provide these services. The states have a strong interest in responding to the disparate needs of these segments of their populations appropriately, and therefore have an interest in showing that differences between these groups can be addressed without violating the Equal Protection Clause.

SUMMARY OF ARGUMENT

The states and federal governments have long recognized fundamental differences between the disabilities and care of mentally ill and mentally retarded persons. The *amici* states assert that the Sixth Circuit's ruling in this case questions the foundations of state statutes which provide for the care of these groups of people, and therefore that ruling potentially undermines the services provided pursuant to those statutes. Specifically, the Sixth Circuit found that mentally retarded persons in Kentucky may not be institutionalized without proof "beyond a reasonable doubt" that institutionalization is required. Application of that standard of review was required under the Equal Protection Clause, because Kentucky employs that standard of review in commitment hearings for mentally ill persons, and the court found no rational basis for differentiating between mentally ill and mentally retarded individuals.

In so ruling, the Sixth Circuit failed to recognize the differences between these two segments of the population, differences which the legislatures of the United States and the several states have long recognized. Given those differences, and the greater invasiveness of the probable treatments and stigmatization that arises from commitments of mentally ill persons, Kentucky's separate procedures provided for placing mentally ill or mentally retarded persons in state facilities are

fully consistent with equal protection guarantees, and the Sixth Circuit's ruling to the contrary should be reversed.

Kentucky's establishment of a hearing process using a "clear and convincing" standard of proof more than adequately protects the constitutional rights of its mentally retarded residents, and no higher standard is constitutionally mandated. In fact, the states have adopted a variety of approaches for providing services to mentally retarded individuals, and states' inherent governmental authority to develop proper approaches should not be limited in the manner suggested by the Sixth Circuit. For example, several states satisfy constitutional requirements not with "commitment hearings" (*i.e.*, hearings prior to committing a person to an institution, a term most commonly used as to mentally ill persons), but rather by having guardians appointed where needed to act in the best interest of mentally retarded individuals for all kinds of decisions, including decisions regarding residence. These alternative approaches, which allow greater respect and dignity for family members while still protecting the rights of the mentally retarded individual, should be considered in reviewing the Sixth Circuit's more restrictive holding.

The *amici* states are understandably concerned that the Sixth Circuit's mandate of hearings using the highest recognized standard of proof places unwarranted additional costs on the State of Kentucky, to the detriment of the mentally retarded individuals who rely on state services. The state *amici* note that, despite federal and state initiatives to rely less on institutions and more on community settings for the mentally retarded, both state and federal dollars are still disproportionately spent on institutions. Requiring additional process for institutional placements may ultimately frustrate the federal and state goals favoring community settings, and should be rejected by this Court.

ARGUMENT

I. The Equal Protection Clause is Not Violated By Providing Different Hearing Procedures for Mentally Ill and Mentally Retarded Persons, Because There Are Fundamental Distinctions Between These Segments of the Population

The state *amici* provide services for persons with mental retardation and other developmental disabilities,[1]

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[1] "Developmentally disabled" is term which includes but is not limited to mental retardation. It gained national recognition in the Developmentally Disabled Assistance and Bill of Rights Act of 1975, Act of October 4, 1975, Pub. L. No. 94-103, 1975 U.S. CODE CONG. & AD. NEWS (89 Stat.) 486 (codified at 42 U.S.C. § 6000 *et seq.*), where it was said to include disabilities attributable to mental retardation, cerebral palsy, epilepsy, autism, or other conditions closely related to mental retardation, or dyslexia resulting from any of those disabilities. 1975 U.S. CODE CONG. & AD. NEWS (89 Stat.) 497 (current version codified at 42 U.S.C. §6001(7)(A)(i)). A revised definition in 1978, set forth in Public Law 95-602, 1978 U.S. CODE CONG. & AD. NEWS (92 Stat.) 2955, 3004-05 (amending 42 U.S.C. §6001(7)(A)(i)) changed the focus from named diagnoses to specified limitations in a person's functioning and development. However, the conference report on this amendment specified that this definition "is intended to cover everyone currently covered under the definition and is also intended to add other individuals with similar characteristics." HOUSE CONFERENCE REPT. NO. 95-1780, 95th Cong., 2d Sess. 104-105, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 7416. Because the term "mentally retarded" is used in the Kentucky statute and the Sixth Circuit decision under review here, the term "mentally retarded" will be used primarily in this brief, even though some of the state *amici* use the more inclusive "developmentally disabled" term in their statutes.

pursuant to state laws. *See, e.g.*, N.J. STAT. ANN. § 30:6D-23 *et seq.* (West Supp. 1992); MICH. COMP. LAWS ANN. § 330.1116 (West 1980). The United States also has enacted significant legislation regarding mentally retarded persons, but the states continue to have the primary governmental responsibility for providing needed services. Accordingly, the states have an interest in cases such as this which, through interpretation of federal constitutional guarantees, could affect the manner in which the states carry out this important responsibility.

In this case, the state *amici* support Kentucky's argument that the Sixth Circuit erred in the way in which it applied the federal Equal Protection Clause to Kentucky's statute. The Court has stated that "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest," and that "[w]hen social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude...." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985). This general rule gives way to heightened scrutiny where classifications are made by race, alienage, national origin or gender, but the Court has ruled that heightened scrutiny is not warranted where classifications are based upon mental retardation. *Id.*, 473 U.S. at 442-47.

In its equal protection ruling here, the Court of Appeals suggested that it was applying the rational basis test, but instead of presuming that Kentucky's statute was valid, the circuit court held that Kentucky had failed to prove its reasons for the statutory classifications, *Doe v. Cowherd*, 965 F.2d 109, 112 (6th Cir. 1992), thereby turning the presumption of statutory validity on its head. When analyzed properly, Kentucky's position is sound, because there are rational distinctions between mentally ill and mentally retarded persons for purposes of establishing procedures for placing members of those two groups in state institutions. Kentucky's statute, like many statutes in the states and the United States, recognizes those distinctions and because those distinctions have a rational basis, the Kentucky statute should be upheld as fully consistent with the federal Equal Protection Clause.

A. The Federal Government and Most State Governments Have Historically Recognized Differences Between Mentally Ill and Mentally Retarded Persons

The different needs of mentally ill and mentally retarded persons were highlighted in the early 1960's at the federal level of government, when separate programs were proposed to deal with the needs of these two groups. In a speech to Congress in 1963, then-President Kennedy outlined his goals for legislative initiatives to address the needs of the mentally retarded and mentally ill. President's Message to Congress on Mental Illness and Mental Retardation, 1963 U.S. CODE CONG. & AD. NEWS 1466 (February 5, 1963). These initiatives were presented to Congress at the same time, but as separate program needs with separate appropriation requests. In response to that address, Congress passed the Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963, Act of October 31, 1963, Pub. L. No. 88-164, 1963 U.S. CODE CONG. & AD. NEWS (77 Stat. 282) 309, which provided specific programs for both the mentally ill and the mentally retarded, as distinct groups.

Whether in response to that federal legislation or otherwise, many states have separate statutory provisions

dealing with mentally ill and mentally retarded individuals. In fact, in a large number of states, separate divisions of state government address the needs of these two groups, and services are provided according to separate statutes. *See* 1a. "Mental retardation" has been defined under these statutes as "a significant subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior which are manifested during the developmental period." N.J. STAT. ANN. § 30:4-25.1a(5) (West Supp. 1992); *see also, e.g.*, NEV. REV. STAT. § 433.174 (1991); FLA. STAT. ANN. § 393.063(41) (West Supp. 1992). Definitions for "mental illness" vary more widely in construction, but include "a current, substantial disturbance of thought, mood, perception or orientation which significantly impairs judgment, behavior or capacity to recognize reality...." N.J. STAT. ANN. § 30:4-27.2r (West Supp. 1992); *see also, e.g.*, FLA. STAT. ANN. § 394.455(3) (West 1986). Services for the mentally ill therefore focus more on psychiatric treatment and possible remission of illnesses which can enable patients to receive ongoing treatment on an outpatient basis, *see, e.g.*, N.J. STAT. ANN. § 30:4-27.1 (West Supp. 1992); FLA. STAT. ANN. § 394.455(3) (West 1986), while services for persons with mental retardation and other forms of developmental disability primarily focus on education and training to make the most of limitations in mental development which have their onset prior to adulthood. N.J. STAT. ANN. § 30:6D-25(b) (West 1981 and Supp. 1992); ARIZ. REV. STAT. ANN. § 36-554A.1. (Supp. 1992); NEV. REV. STAT. § 433.214 (West 1991).

In 1975, Congress passed the Developmentally Disabled Assistance and Bill of Rights Act of 1975 (hereafter, "Developmentally Disabled Act of 1975"), Act of October 4, 1975, Pub. L. No. 94-103, 1975 U.S. CODE CONG. & AD. NEWS (89 Stat.) 486 (codified at 42 U.S.C. § 6000 *et seq.*), which provided, among other things, for funding to the states conditioned upon their development of a state plan, which plan was required to "support the establishment of community programs as alternatives to institutionalization." *Id.* at (89 Stat.) 491 (formerly codified at 42 U.S.C. § 6062(b)(23); current version at 42 U.S.C. § 6022(b)(C). Accordingly, many states follow that federal legislation in encouraging community living for mentally retarded persons, *e.g.*, N.J. STAT. ANN. § 30:6D-13 (West 1981 and Supp. 1992); MINN. STAT. ANN. § 252.50 (West 1982 and Supp. 1992), which can mean living at home or in other facilities such as supervised apartments or group homes where supervision and assistance in daily living is available. *See, e.g.*, N.J. ADMIN. CODE. TIT. 10, §44A-6 to -7 (1988); MD. HEALTH GEN. CODE ANN. § 7-101(h) (1990); FLA. STAT. ANN. § 393.063(25), (38), (48) (West Supp. 1992).

In addition, however, nearly all of the states do have some institutions, whether operated by the states themselves or licensed by the states, where mentally retarded individuals can be placed for residential care. Significantly, many states provide separate institutions for their mentally ill and their mentally retarded residents. *See, e.g.*, N.Y. MENTAL HYG. LAW § 13.17(b) and § 7.17(b) (McKinney 1988 and Supp. 1992); MINN. STAT. ANN. § 252.025 and § 253.015 (West 1982 and Supp. 1992); WISC. STAT. ANN. § 51.05 and § 51.06 (West 1987 and Supp. 1992). The establishment of separate facilities is not surprising, because the purposes of these two types of institutions are very different. The primary purpose for the state hospitals for the mentally ill is to provide emergency treatment for the mental illness, particularly to deal with circumstances where because of mental illness, a person is a danger to himself or others. *See,* OHIO REV. CODE ANN. § 5122.01(B) (Page 1989); N.H. REV. STAT. ANN. § 135-C:27 (1990). In contrast, the institutionalization of mentally retarded persons is often based upon the finding that these individuals are unable to care for themselves in the community and require professional staff to meet some or all of their care or education needs.[2] Contrary to the finding of the Sixth Circuit, these differing purposes behind institutional placement support Kentucky's claim that there is a stigmatization associated with mental illness that does not attach to mental retardation.[3]

Numerous state statutes also give credence to Kentucky's argument, rejected by the Sixth Circuit, that services at mental retardation facilities are less "intrusive" than those provided for mentally ill patients. Mental retardation services are primarily habilitative,[4] with a focus in the statutes on how to improve the mentally retarded person's self-care or self-sufficiency skills. *See, e.g.*, N.J. STAT. ANN. § 30:6D-25f (West 1981 and Supp. 1992); WISC. STAT. ANN. § 51.437(1) (West 1987); WYO. STAT. ANN. § 25-5-102(a)(x) (West 1990 and Supp. 1992). While mentally ill persons may also need improvement in these skills, the primary focus of the statutes for hospitalizing mentally ill persons is "treatment" which has been defined as "care, diagnostic, and therapeutic services including the administration of drugs and any other service for the treatment of an individual." MICH. COMP. LAWS ANN. § 330.1400(e) (West 1980); *see also, e.g.*, WYO. STAT. ANN. § 25-10-101(a)(xiii) (West 1990 and Supp. 1992). These differences in the focus of the services provided at the separate institutions for mentally retarded and mentally ill persons further support Kentucky's argument that the Sixth Circuit's ruling erroneously applied the Equal Protection Clause in this case.

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[2] For example, in Connecticut, an application to place a mentally retarded person in an institution involuntarily must allege that the person is unable to provide for himself or herself in at least one of the following areas: education, habilitation, care for personal health or mental health needs, meals, clothing, safe shelter or protection from harm. In addition, the application must allege that there is no family member or guardian who can provide adequate care, that the person is unable to obtain care, treatment, education or habilitation without a placement order, and that the person is not willing voluntarily to apply for admission. CONN. GEN. STAT. ANN. §17a-274 (West 1992).

[3] There are situations where a mentally retarded person also suffers from mental illness, and states may have statutes addressing the commitment or transfer of such person to a psychiatric care facility when this mental illness is present. *See, e.g.*, CONN. GEN. STAT. ANN. § 17a-280(c) (West 1992).

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[4] As this Court noted in *Pennhurst State School v. Halderman*, 451 U.S. 1, 7, n. 2 (1981), "there is a technical difference between 'treatment,' which applies to curable mental illness, and 'habilitation,' which consists of education and training for those, such as the mentally retarded, who are not ill." *See also Youngberg v. Romeo*, 457 U.S. 307, 309, n. 1 (1982)(quoting from the American Psychiatric Association's *amicus* brief: "The word 'habilitation'... is commonly used to refer to programs for the mentally retarded because mental retardation is ... a learning disability and training impairment rather than an illness. [T]he principal focus of habilitation is upon training and development of needed skills."). *See also, e.g.*, ILL. ANN. STAT. ch. 91½, ¶ 1-111 (Smith-Hurd 1987 and Supp. 1992); ME. REV. STAT. ANN. tit. 34-B, § 5461(6) (1988). Nevertheless, the Sixth Circuit here ruled there was a "dispute as to whether mentally retarded persons can be treated so as to improve their condition." 965 F.2d at 112.

B. Kentucky's Use of A Different Standard of Review For Hearings Involving Mentally Retarded Individuals, As Distinguished From Mentally Ill Individuals, Is Appropriate in Light of The Recognized Differences Between Those Groups

The foregoing discussion highlights the significant distinctions which Kentucky, other states and the United States use in establishing laws which relate to mentally retarded and mentally ill persons. The Sixth Circuit recognized that "the mere identification of differences is not enough; equal protection 'require[s] that a distinction made have some relevance to the purpose for which the classification is made.'" *Cowherd, supra*, 965 F.2d at 112, *citing Baxtrom v. Herold*, 383 U.S. 107, 111 (1966). However, because it erroneously disregarded the presumption of statutory validity and rejected Kentucky's claims that the purposes for institutional placement and the presence of stigma are different, that court rejected the differing statutory procedures.

Moreover, the Sixth Circuit relied on *Denton v. Commonwealth*, 383 S.W.2d 681 (Ky. App. 1964), to conclude that the "mentally ill and mentally retarded are identical insofar as they lose their personal liberty by involuntary institutionalization." 965 F.2d at 113. However, this conclusion ignores this Court's ruling in *Addington v. Texas*, 441 U.S. 418 (1979), which held that a "clear and convincing" standard was all that is constitutionally required for the commitment of mentally ill persons. Thus, to the extent that the Sixth Circuit's ruling means that all hearings which may result in a loss of personal liberty require the same standard of proof, this is plainly inconsistent with *Addington*, where the standard of proof for a loss of liberty arising from a civil commitment for mental illness was permitted to be lower than the standard of proof for a loss of liberty arising from a criminal conviction.

The question then remains whether the mentally ill and mentally retarded can still be considered "identical" insofar as the standard of proof required for their institutionalization, when the overlay of viewing all liberty deprivations the same is lifted. The answer must be no. The Equal Protection Clause analysis focuses on whether similarly situated groups are treated similarly. Here, as discussed above, statutes describe institutions for mentally ill persons as including "treatment" by physicians and more particularly psychiatric professionals. In contrast, the mentally retarded are institutionalized to provide for their everyday care and for education and training toward achieving greater self-sufficiency. Hospitalized mentally ill persons may be asked to reveal thought processes and to express their deepest feelings, *see generally*, THE HARVARD GUIDE TO MODERN PSYCHIATRY 357-491 (A. Nicholi, ed. 1978) and L.D. Handkoff, EMERGENCY PSYCHIATRIC TREATMENT (1969), while the mentally retarded person will focus more on how to accomplish tasks involving everything from personal hygiene to daily employment. *See, e.g.*, N.J. STAT. ANN. § 30:6D-25f (West 1981 and Supp. 1992); ME. REV. STAT. ANN. tit. 34-B, § 5609 (Supp. 1991-92). Kentucky rationally considered the former to be more invasive and stigmatizing, and therefore could rationally determine that something greater than the constitutional minimum set forth in *Addington* was appropriate for committing mentally ill persons, without also believing that this higher standard was needed to protect mentally retarded persons from habilitation in state facilities.

In light of those differences, Kentucky's distinction in the procedures provided for placing mentally ill or mentally retarded persons in a state facility are fully consistent with equal protection guarantees. Similarly, the differences between these two groups constitutionally permit states to provide for other procedural differences, such as Kentucky's statute which allows parents and guardians to participate as parties in hearings involving the mentally retarded, where similar status is not provided to parents and guardians of mentally ill individuals. Accordingly, the Sixth Circuit's holding that Kentucky's statutes violated equal protection is without merit and must be reversed.

II. The Equal Protection Clause Does Not Prevent The States From Using Less Adversarial and Less Costly Means Than Commitment Hearings Using the Highest Standard of Review, and the States Should Be Allowed That Flexibility To Maximize Their Resources for Services to Mentally Retarded Persons

The state *amici* take this opportunity to inform the Court of the many differing approaches states use in providing institutional care for their mentally retarded residents. Many states do not require hearings such as those provided in Kentucky, but instead allow mentally retarded adults or their guardians to apply for voluntarily admission into residential facilities. *See* 2a-4a. This approach shows well-earned respect for families with mentally retarded members. As this Court wrote in *Parham v. J.R.*, 442 U.S. 584 (1979), the law historically recognizes that "natural bonds of affection lead parents to act in the best interests of their children" at 602, and thus, "[t]he statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition." *Id.* at 603.

Indeed, facts available regarding institutionalization show that, even among persons with severe mental retardation, for whom disorders such as visual, hearing and speech defects, epilepsy, incontinence and severe behavioral problems may often exist, two out of every three persons with severe retardation are *not* in institutions. Moroney, *Family Care: Toward a Responsive Society,* in ETHICS OF DEALING WITH PERSONS WITH SEVERE HANDICAPS 217, 217-20 (P. Dokecki and R. Zaner eds. 1986). Furthermore, those children who are institutionalized are likely to have the most severe handicaps. *Id.* at 221. This was so in Kentucky, at least at the time of the District Court decision in *Doe v. Austin,* where, of 800 institutionalized mentally retarded persons, 100 were moderately or mildly retarded, 222 were severely retarded and 487 were profoundly retarded. Appendix to Petition, 51a.

In light of these facts, statutes allowing parents or guardians[5] to make residential decisions without requiring a court hearing, thereby presuming that they act in the best interest of the mentally retarded person, allows appropriate dignity to be accorded to those family members and appointed guardians. A broad rule in this case which would undercut these statutes should be avoided, in light of this Court's statements that states "must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold." *Addington, supra,* 441 U.S. at 430-31 (1979). In addition, this Court has recognized that the mentally retarded are a "large and diversified group," and that statutes dealing with and providing for them "is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary." *Cleburne, supra,* 473 U.S. at 442-43 (1985) [footnotes omitted]. The Court further wrote that "[e]specially given the wide variation in the abilities and needs of the retarded themselves, governmental bodies must have a certain amount of flexibility and freedom from judicial oversight in shaping and limiting their remedial efforts." *Id.* at 445. In fact, similar needs for state flexibility were present in a case regarding removal of artificial nutrition and hydration, where Justice O'Connor wrote: "Today we decide only that one State's practice does not violate the Constitution; the more challenging task of crafting appropriate procedures for safeguarding incompetents' liberty interests is entrusted to the 'laboratory' or the States [citation omitted] in the first instance." *Cruzan v. Dir., Missouri Dept. of Health*, 110

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[5] Guardians here may or may not be family members, although some states which provide for appointment of guardians for the mentally retarded do seek to provide for family members to be appointed as guardians. *See, e.g.*, N.J. ADMIN. CODE tit. 10, § 43-4.1, -7 and -8 (1989); N.H. REV. STAT. ANN. § 171-A:10(II) (1990); MINN STAT. ANN. § 252A.03, Subd. 4 (West Supp. 1992). However, there also may be provisions for appointing a state official with authority in the provision of services for the mentally retarded, when not other appropriate guardian is available. *See, e.g.*, N.J. STAT. ANN. §30:4-165.12 (West 1981 and Supp. 1992); MINN. STAT. ANN. § 252A.03, Subd. 1 (West Supp. 1992). Such statutory schemes are similar to the situation discussed by this Court in *Parham*, where the Court held that the state agency has a duty to consider the best interests of mentally ill children who are wards of the state, and that therefore the State may constitutionally allow the state agency to speak for the child, subject to the restrictions governing natural parents. *Parham, supra*, 442 U.S. at 619.

S.Ct. 2841, 2859 (1990)(O'Connor, J., concurring). While recognizing the approaches used by other states here, this Court should therefore find that the Kentucky statute has addressed these difficult, technical issues in a manner consistent with the Constitution and the Sixth Circuit's decision requiring additional protections should be reversed.

The state *amici* further note that, consistent with federal and state initiatives described previously which seek to rely less on institutions and more on community settings for the mentally retarded, the states have made significant progress in reducing the number of mentally retarded persons in institutions. Between 1977 and 1989, the number of people with developmental disabilities residing in large institutions dropped 42%, to 88,112 people, which is the lowest number since 1934. B. WRIGHT, M. KING AND THE NATIONAL CONFERENCE OF STATE LEGISLATURES TASK FORCE ON DEVELOPMENTAL DISABILITIES, AMERICANS WITH DEVELOPMENTAL DISABILITIES: POLICY DIRECTIONS FOR THE STATES 21 (1991). Indeed, New Hampshire has become the first state to close all of its institutions for persons with developmental disabilities. *Ibid.* Nevertheless, nationally state and federal dollars are still disproportionately spent on institutions. In 1988, state and local governments spent $4.2 billion on community care and $2.7 billion on institutional care, even though about 90% of persons with developmental disabilities live in the community. B. WRIGHT, WHAT LEGISLATORS NEED TO KNOW ABOUT MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES 3 (1990). This means that states spent close to 40% of their resources on 10% of their clients. *Ibid.* The addition of further procedures prior to placing mentally retarded persons in institutions will continue to skew the allocation of state monies toward institutional care, in conflict with the federal and state policies favoring community care.

Furthermore, this Court has recognized in *Parham* that increasing procedures prior to hospitalizing mentally ill children would mean that mental health professionals would spend increased time traveling to, waiting for and participating in hearings, instead of spending that time caring for patients. *Parham, supra,* at 606. Requiring further hearings using higher standards of proof for institutional placements of mentally retarded persons will similarly divert professionals from their care and habilitative functions, and the cost of these additional procedures and professionals' time will necessarily come from the budgets for services for the mentally retarded.

It is worth noting two additional procedures used by states which help ensure appropriate protections for the mentally retarded. First, some states require regular reevaluations of the appropriateness of the mentally retarded person's placement in the institution, even where the placement is the result of a voluntary admission. *See, e.g.*, MICH COMP. LAWS ANN. § 330.1510 (West 1980); MD. HEALTH GEN. CODE ANN. § 7-505 (1990); KAN. STAT. ANN. § 76-12b05 (1989). Second, in the Developmentally Disabled Act of 1975, Congress conditioned the payment of certain funds to the states upon their establishment of a system of advocacy and protection for the developmentally disabled. 42 U.S.C. § 6012. Many states have followed through on establishing such advocacy and protection agencies. *See, e.g.*, N.J. STAT. ANN. § 52:27E-41.1 *et seq.* (West 1981); ILL. ANN. STAT. ch. 91½, ¶ 1-1150 *et seq.* (Smith-Hurd 1987 and Supp. 1992); N.Y. MENTAL HYG. LAW § 47.01 (McKinney 1988); MASS. GEN. LAWS ANN. ch. 19C, § 2 (Supp. 1992). In light of these additional protections provided by states, the universal requirement of hearings using a beyond a reasonable doubt standard is certainly unwarranted.

Of course, some states -- now including Kentucky as a result of the Sixth Circuit's decision in *Doe v. Austin*, 848 F.2d 1386 (6th Cir. 1988), *cert. denied sub nom Cowherd v. Doe*, 488 U.S. 967 (1988) -- have provided for and budgeted for hearings prior to placing mentally retarded persons in institutions. For the most part, these states provide for using a "clear and convincing" standard at those hearings.[6] Where those states have used the same standard for commitment of mentally ill persons as *Addington* permits, the Sixth Circuit's equal protection analysis clearly would not invalidate those statutes. However, in light of the invasiveness of the probable treatments and the potential stigma of commitments of mentally ill persons, Kentucky can certainly show rational reasons for requiring a standard of proof beyond the constitutional minimum before committing mentally ill persons, without exceeding the constitutional minimum where mentally retarded individuals are being placed in institutions for their care and habilitation. Because it failed to recognize

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[6] Like Kentucky, Michigan also uses different standards of review for hearings which it provides for mentally ill and mentally retarded individuals. In commitment hearings for the mentally ill in Michigan the "clear and convincing" standard approved by this Court in *Addington* is used, MICH. COMP. LAWS ANN. § 330.1465 (West 1980), while in hearings to admit mentally retarded persons involuntarily, the traditional preponderance standard is used. However, Michigan does use the "clear and convincing" standard for appointment of guardians for the mentally retarded, and does not permit a guardian to place such person in a "facility" without court approval. MICH. COMP. LAWS ANN. § 330.1623 (West 1980). "Facility" in this statute includes both institutions and community residential programs. MICH. COMP. LAWS ANN. § 330.1600 (West 1980).

these legitimate policy distinctions, the Sixth Circuit's decision here found a violation of the Equal Protection Clause where none exists, and should be reversed by this Court.

CONCLUSION

For all of the foregoing reasons, the judgment of the Sixth Circuit should be reversed.

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December 3, 1992

APPENDIX

I. State Laws Which Establish Separate Governmental Agencies For Mental Retardation Or Developmental Disabilities Services

ARK. STAT. ANN. § 20-48-202,-210 (1991)

ARIZ. REV. STAT. ANN. § 36-551(15) (Supp. 1992)

CAL. WELF. & INST. CODE § 4400 (West. 1984)

CONN. GEN. STAT. ANN. § 17a-210 (West 1992)

DEL. CODE ANN. tit. 29, § 7909A (1991)

ME. REV. STAT. ANN. tit. 34-B, § 5201 (Supp. 1991-92)

MD. HEALTH GEN. CODE ANN. § 7-201 (1990)

MASS. GEN. LAWS ANN. ch. 19B, § 1 (West Supp. 1992)

N.H. REV. STAT. ANN. § 135-C:6(II) (1990)

N.J. STAT. ANN. § 30:6D-24 (West Supp. 1992)

N.Y. MENTAL HYG. LAW § 13.01 (McKinney 1988)

OHIO REV. CODE ANN. § 5123.02 (Page 1989 and Supp. 1991)

S.C. CODE ANN. § 44-20-30(7) (Law. Co-op. Supp. 1991)

II. State Laws Which Allow For Admission of Mentally Retarded Persons into Residential Facilities Without Prior Hearings

ALA. CODE. § 22-52-51 (1990)

ARK. STAT. ANN. § 20-48-405, -406 (1991)

ARIZ. REV. STAT. ANN. § 36-560 (1986)

CONN. GEN. STAT. ANN. § 17a-281 (West 1992)

FLA. STAT. ANN. § 393.065 and § 393.0651 (West Supp. 1992)

HAWAII REV. STAT. § 333F-9 (1991)

IDAHO CODE § 66-408-410 (1989)

ILL. ANN. STAT. ch. 91½, ¶ 3-401 (Smith-Hurd 1987 and Supp. 1992)

IOWA CODE ANN. § 222.13 (West 1985)

KAN. STAT. ANN. § 76-12b02 (1989)

ME. REV. STAT. ANN. tit. 34-B, § 5473 (Supp. 1991-92)

MD. HEALTH GEN. CODE ANN. § 7-505 (1990)[1]

MASS. GEN. LAWS ANN. ch. 123B, § 6 (West Supp. 1992)

MICH COMP. LAWS ANN. § 330.1509 (West 1980)

MISS. CODE ANN. § 41-19-207, -239 (Supp. 1992)

MINN. STAT. ANN. § 252.025 (West 1982 and Supp. 1992)

NEB. REV. STAT. § 83-383 (1987 and Supp. 1992)

NEV. REV. STAT. ANN. § 435.122 (1991)

N.H. REV. STAT. ANN. § 171-A:5 (1990)

N.J. STAT. ANN. § 30:4-25.1b (West Supp. 1992)

N.M. STAT. ANN. § 43-1-14 (1989)

N.Y. MENTAL HYG. LAW § 13.17(b) and § 7.17(b) (McKinney 1988 and Supp. 1992); N.Y. ADMIN. CODE tit. 14A, §§ 15.1-15.5 (1988)

N.C. GEN. STAT. § 122C-241 (1989 and Supp. 1992)

OHIO REV. CODE ANN. § 5123.69 (Page 1989)

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[1] Within 21 days of voluntary admission, a hearing officer of the Department must hold a hearing to determine by clear and convincing evidence that the admission was appropriate. § 7-503.

PA. STAT. ANN. tit. 50, §§ 4402-4404 (Purdon 1969 and Supp. 1992)

R.I. GEN. LAWS § 40.1-21-6.1 (1991)

S.C. CODE ANN. § 44-20-440 (Law. Co-op. Supp. 1991)

S.D. CODIFIED LAWS ANN. § 27B-5-2 (1992)

TENN. CODE. ANN. § 33-5-101 (Supp. 1992)

TEX. HEALTH & SAFETY CODE ANN. § 593.022 (1992)

W. VA. CODE § 27-4-1 (1992)

WISC. STAT. ANN. § 51.10 (West 1987 and Supp. 1992)

WYO. STAT. ANN. § 25-5-117 (West Supp. 1992)

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NO. 92-351

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

LEONARD E. HELLER, SECRETARY,
KENTUCKY CABINET FOR HUMAN RESOURCES,

Petitioner,

V.

SAMUEL DOE, BY HIS MOTHER AND NEXT
FRIEND, MARY DOE, ET AL.

Respondents.

On Writ of Certiorari To The
United States Court of Appeals
For The Sixth Circuit

BRIEF OF VOICE OF THE RETARDED (VOR), ET AL. AS AMICI CURIAE IN SUPPORT OF PETITIONER

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NO. 92-351

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Respondents.

On Writ of Certiorari To The
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For The Sixth Circuit

BRIEF OF VOICE OF THE RETARDED (VOR), ET AL. AS AMICI CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICI

Voice of the Retarded (VOR) was organized in 1983 in Illinois by a group of parents whose children resided in larger facilities for developmental disabled persons. It was incorporated as a Not-For-Profit Corporation in 1984. The organization has grown to include parents, family members, providers, professionals, friends, and affiliated groups in forty-seven states. The members have involvements or relationships with persons residing in larger MR (Mental Retardation) or DD (Developmental Disabilities) facilities, community living arrangements, and at home. VOR supports a continuum or range of services for people with developmental disabilities; but most importantly, the group is opposed to the nation-wide movement (by some advocacy groups and professionals) to close all larger and medium-sized developmental centers. VOR promotes freedom of choice and a range of residential programs to meet the special needs of many special citizens. VOR supports the existence of residential choices.

VOR and many of its affiliated groups submit this brief as *amici curiae* in support of the petitioner Leonard E. Heller, Secretary, Cabinet for Human Resources, State of Kentucky in *Samuel Doe, et al. v. Leonard E. Heller*, United States Supreme Court, No. 92-351. VOR and the other amici groups urge this Court to reverse the ruling of the United States Court of Appeals for the Sixth Circuit in *Doe v. Cowherd*, 965 F.2d 109 (6th Cir. 1992) and *Doe v. Austin*, 848 F.2d 1386 (6th Cir. 1988), *cert. denied*, 488 U.S. 967 (1988). This brief is being filed by counsel for VOR. Consent to join this brief has been provided by the organizations listed in the Appendix. A purpose of VOR, as provided in its constitution, is

> to unite organizations and concerned individuals in promoting the general welfare of persons with mental retardation wherever they may be and particularly those who are presently in residential placement or in need of this service . . . .

The issues presented by this case are

(1) whether Kentucky may in its commitment procedures establish "the clear and convincing" standard of proof for involuntary commitments of mentally retarded adults, which is different from the "beyond a reasonable doubt" burden of proof required for commitment of mentally ill adults in Kentucky (1992 decision, Court of Appeals);

(2) whether Kentucky may by statute enable third parties (in particular, family members and guardians), to participate in commitment proceedings for mentally retarded adults, without violating equal protection and due process (1992 decision, Court of Appeals);

(3) whether there is a rational basis for distinguishing between mentally ill and mentally retarded persons for determination of civil commitments (1988 decision, Court of Appeals);

(4) whether Kentucky commitment statutes for mentally retarded adults must conform to the commitment procedures for mentally ill persons (1988 decision, Court of Appeals);

(5) whether mentally retarded adults must be committed to treatment centers in Kentucky through a judicial hearing, under due process or equal protection standards (1988 decision, Court of Appeals); and

(6) whether it is a violation of due process for parents and guardians of persons to be committed to serve as members of interdisciplinary teams (1988 decision, Court of Appeals).

These issues are of vital importance in all fifty states. Although at least one state, New Hampshire, no longer maintains its congregate care facility for developmental disabled persons, most states still have one or more larger facilities, along with community living arrangements. Furthermore, there are many variations in the guardianship laws in the fifty states, and there are differences in the procedures for assigning disabled people in public or private facilities, large and small. VOR submits that in most states, residential placements of mentally retarded persons outside of their homes are treated essentially as voluntary, whether the facilities be large, medium, or small. It is not known whether disabled persons are anywhere committed to community living arrangements (CLAs). It should be seen that the Supreme Court's ruling in the present case may have profound effects upon state service systems for disabled people.

As a primary organization which represents parents and family members of developmental center residents, VOR has a close and direct interest in the outcome of this case. It is joined in this brief by the organizations listed in the Appendix.

The organizations shown have consented to join in the VOR *amici curiae* brief, and they claim the same interest in this case as does VOR. They are parent and guardian groups of specific developmental centers and training schools, and in some instances, they are state-wide parent/guardian associations.

SUMMARY OF ARGUMENT

(1) The Kentucky Statutes treating the commitment of a mentally retarded person differently from mentally ill persons do not violate due process or equal protection. The Sixth Circuit Court and the District Court (W.D. Ky) erred in holding that commitment statutes for mentally retarded persons must conform to the procedures and rights afforded to the mentally ill. There are many differences between persons who suffer from mental illness and mental retardation, in addition to the one distinction recognized by the Sixth Circuit Court, that mentally ill persons treated with medications may recover within short periods of time.

Developmental disabilities occur in a myriad of forms, and the residential facilities and support systems must be adapted to meet the varied needs of DD persons. Developmental centers for disabled people are substantially different from mental hospitals. No attention was given in the opinions below to the nature of developmental centers and the specialized care given in different centers. They are primarily places of residence and care, providing structured support for residents based on need; they are not places of isolation and segregation.

Commitment to a mental retardation center is not like commitment to a mental hospital. Mental retardation centers are places of residence, as are smaller residential facilities for developmentally disabled persons.

(2) Larger developmental centers — sometimes called institutions — provide support services for severely impaired people which cannot be found in other settings. The lower court rulings in this case do not adequately address the nature of these facilities and services and do not make an accurate distinction with mental health facilities. Citations from recent journals are provided in the brief to show the confusion over the word "institutions." Some professionals are now saying that community systems created during the past twenty years are becoming institutionalized like the larger facilities. If formal commitments are required to place retarded persons in the larger facilities, it makes no sense to exempt other residential facilities from the same procedures.

(3) The decisions of the lower courts in this case reflect the old bias against larger institutions. Disabled persons normally reside in residential centers for a long term. They are assigned to the centers for "habilitation" and "training." They are treated for physical ailments, but they are provided opportunities to improve their basic skills through "habilitation." The lower courts erred in not recognizing this difference.

(4) Due process and equal protection should not require commitment hearings for mentally retarded persons before a judicial officer. *Secretary of Public Welfare of Pa. v. Institutional Juveniles*, 442 U.S. 640 (1979); *Parham v. J. R.*, 442 U.S. 584 (1979). There is a rational basis for distinguishing between the mentally ill and the mentally retarded with regard to their civil commitments. There was no real exploration of this question shown in the record of this case. There was no analysis

of the significant differences in the types of facilities which exist to support developmentally disabled persons, a significant failure of the lower Courts.

(5) The standard of proof required for mental retardation commitments under Kentucky law is the standard found "constitutionally adequate" in *Addington v. Texas*, 441 U.S. 418, 433 (1979). Respondents relied upon *Clark v. Cohen*, 613 F. Supp. 684 (E.D. Pa. 1985), a case which directed Pennsylvania to transfer a person with mild retardation from a mental health center to a community living arrangement. The court noted that the standard of proof for commitments in Pennsylvania was "clear, unequivocal, and convincing" evidence. The burden of proof required for criminal convictions, guilt "beyond a reasonable doubt," is too high for civil commitments. There is no basis to hold the Kentucky burden of proof standard unconstitutional under either due process or equal protection.

(6) The Supreme Court should review both the 1988 and 1992 decisions of the Sixth Circuit Court of Appeals. By denying writ of certiorari, the court has not approved the 1988 decision. The 1988 decision of the Court of Appeals is not conclusive. The Sixth Circuit Court remanded the case for further action. The Supreme Court has power to correct all errors of law in this case.

(7) The Supreme Court should reverse the decision of the Sixth Circuit in 1992 which declared that Kentucky could not by statute enable third parties to participate as parties in commitment proceedings for mentally retarded adults. This provision in the Kentucky statutes was added as part of HB 511 in 1990. *Ky. Rev. Stat.* §202B.160(3). There is no rational basis to deny third parties, particularly parents, family members and guardians, the right to participate in commitment hearings. Parents and guardians are in a better position than many experts to present countervailing arguments (and facts) to contentions that persons should not be assigned to larger developmental centers. The Supreme Court has recognized the rights of parents and guardians to represent their minor children in hearings for commitments to mental hospitals. *Parham v. J. R.* 442 U.S. 584 (1979). There is no sound reason to deny parents and guardians the role as parties in proceedings for their mentally retarded adult children and wards, whether or not the statute permits appointment of independent counsel for the person to be committed.

ARGUMENT

I. THE KENTUCKY STATUTE WHICH AUTHORIZES COMMITMENT OF MENTALLY RETARDED PERSONS UPON THE CLEAR AND CONVINCING STANDARD OF PROOF DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

A. Case History and Commentary.

In addressing this first issue, the Supreme Court should first consider the early stages of this case. On November 20, 1986, the United States District Court held that the Kentucky statutes treating commitment of mentally retarded persons differently from mentally ill persons violated the Equal Protection Clause. See *Ky. Rev. Stat.* §202B.050 (1986); *Doe v. Austin*, 668 F. Supp. 597, 600-601 (1986). Following the predilection that mentally ill and mentally retarded persons must be treated alike in their commitment proceedings, the District Court stated that it would violate due process "for Kentucky to involuntarily commit a mentally retarded person who is eighteen years of age or over without first awarding him a judicial hearing." *Id.*, 668 F. Supp. at 600. The District Court held further that labeling a commitment as "voluntary" does not change the character of the commitment of a mentally retarded person by his guardian or relative when the mentally retarded person is committed without his or her consent. *Id.*, 668 F. Supp. at 600. The statute which treated the application by parents or guardians for placement of their retarded family members or wards in any mental retardation center as voluntary, was declared to violate due process. *Ky. Rev. Stat.* §202B.040(5); *Id.*; *Doe*, 668 F. Supp. at 600. The Court did not reach the question what review procedures would be required for MR commitments, noting the differences between mentally ill persons and those with mental retardation. Mentally ill persons may recover within short periods of time; whereas, "severely and profoundly mentally retarded persons very rarely experience such dramatic improvements in their condition." *Id.*, 668 F. Supp. at 601. The court recognized this clear difference between these two major groups of disabled persons: damaged brains do not repair with medications.

The District Court in its 1986 decision distinguished the Supreme Court decision in *Parham v. J. R.*, 442 U.S. 584 (1979), in which the Supreme Court declared that the Georgia procedures for admission of a minor child to a Georgia mental health facility did not violate due process. The Court in *Parham* held that due process did require some kind of inquiry be made by a neutral fact-finder to determine whether a state's statutory requirements for admission of a child were satisfied, but the inquiry could be conducted by a staff physician as fact-finder. *Id.*, 442 U.S. at 608. In a related case, the same ruling was made for mentally ill and mentally retarded minor children in Pennsylvania, the Court finding that Pennsylvania procedures complied with due process. *Secretary of Public Welfare of Pa. v. Institutionalized Juveniles*, 442 U.S. 640 (1979).

The District Court in *Doe* recognized the rights and obligations of parents in acting for their minor children, under *Parham v. J.R.* However, the District Court followed the reasoning of the District Court in *Clark v. Cohen*, 613 F. Supp. 684 (E.D. Pa. 1985), which concluded that rights of minors in commitment cases are more restricted than the rights of adults.

The District Court cited *Clark, supra*, 613 F. Supp. at 697-98, 699-700, that "once someone becomes an adult, one's parents lose that degree of authority found so crucial in *Parham*." *Doe, supra*, 668 F. Supp. at 600.

On appeal, the Sixth Circuit Court overruled the District Court's decision that "because *Parham* is not controlling, due process requires that adults who are involuntarily committed are entitled to a judicial hearing." *Doe v. Austin*, 848 F.2d 1386, 1393 (1988), *cert. denied*, 488 U.S. 967 (1988). "Due process does not require that the neutral trier of fact be legally trained or a judicial or administrative officer." *Id.*, 848 F.2d at 1393; *Parham*, 442 U.S. at 607. The Sixth Circuit Court was guided in its reversal of the District Court on this point by *Vitek v. Jones*, 445 U.S. 480 (1980). In *Vitek*, the Supreme Court defined the due process requirements for transferring a state prisoner to a state mental hospital. The Nebraska statute, which permitted such a transfer based upon findings by a physician or psychiatrist that a prisoner suffered from mental disease or defect, was held defective mainly because there was no right to notice and hearing. The Sixth Circuit Court found that, at a minimum, the procedural safeguards approved by the Supreme Court in *Vitek* were required for commitment of mentally retarded adults. *Doe v. Austin*, 848 F.2d at 1393-94.

The Sixth Circuit Court upheld the lower court's decision that the Kentucky procedures for involuntary commitment of adults violated due process, lacking the following requirements:

(1) a procedure for the admittee to present witnesses or documentary evidence;

(2) a clear opportunity for cross-examination; and

(3) opportunity for independent assistance, under statute. *Doe v. Austin*, 848 F.2d at 1394. The Court found that the presence of a parent or guardian of the admittee on the interdisciplinary team, as authorized by *Ky. Rev. Stat.* §202B. 010(1) (1986), posed a serious threat to impartiality. This last obser-

vation by the Court of Appeals indicates a failure in the Court to recognize the absolute pervasion of partiality existing today on all sides of the controversy over assignments of disabled persons to residential facilities.

The partiality (which is certainly not all bad) between proponents on all sides may be seen in the odyssey of Tracy Horton and her family in Kentucky (with 15 or so separate hearings and trials concerning her residential placement). It was an obsession with procedural due process at the expense of common sense, substantive justice, and true impartiality which produced that travesty of justice. There was also an apparent confusion among advocates, professionals, and, yes, the courts in the Horton case. Where was impartiality shown by the attorney assigned to represent Tracy Horton through most of those proceedings? The parents seemed to have the only clear vision for Tracy's welfare during her minority and in the judicial proceedings. Only the father, Thomas Horton, was heard — through his deposition — but his testimony carried the marks of conviction and sincerity. See Thomas Horton deposition, entered in the record of this at R. 213 (hereinafter "*Horton dep.*").

The Court of Appeals then declared the Kentucky statutes and procedures for involuntary commitment of mentally retarded persons in violation of the Equal Protection Clause. Reasons given were that the procedures for such commitments did not conform to mental illness commitments and

> the Commonwealth has not demonstrated that it has any rational basis for distinguishing between the mentally ill and the mentally retarded with regard to a judicial determination of their eligibility for civil commitment.

Doe v. Austin, 848 F.2d at 1394.

It was the existence of a provision in the Kentucky statutes which the Sixth Circuit Court identified as the basis for requiring judicial hearings for admissions of mentally retarded adults to Kentucky's Mental Retardation Treatment Centers ("MRRTCs"). *Ky. Rev. Stat.* 202B.050 (1986); *Doe v. Austin*, 848 F.2d at 1394-1395. The Sixth Circuit Court found that there was no requirement for judicial hearing under the Due Process Clause. *Id.*, 848 F.2d at 1393. However, the Circuit Court held that the Commonwealth had not demonstrated that it had "any rational basis for distinguishing between the mentally ill and the mentally retarded with regard to a judicial determination of their eligibility for civil commitment." 848 F.2d at 1394. The Court in support of this decision cited *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985); *Kremens v. Bartley*, 431 U.S. 119, 135-36 (1977); *Bastromb v. Herold*, 383 U.S. 107, 111 (1966). In the *Kremens* case, the Supreme Court stated in additional litigation, the District Court should pay careful attention to the difference between mentally ill and mentally retarded. *Kremens*, 431 U.S. at 135-136.

It was the finding that there was no rational basis for distinguishing between the mentally ill and the mentally retarded which formed the basis for the *Doe* decision in 1988 that all commitments of mentally retarded adults by their parents or guardians were involuntary. However, the record reveals no real exploration of this question by the parties or by the court. *Amici*, which represent thousands of parents, family members, and guardians throughout the country, have no difficulty in making distinctions between these two groups for establishing different classifications and procedures for residential placements.

The Court of Appeals cited *Cleburne, supra*, at 439 for the proposition that equal protection requires "that all persons similarly situated should be treated alike." *Doe, supra*, at 1394. The Court acknowledged that there were differences between the mentally ill and the mentally retarded; but, except for seeing that mentally ill persons may recover within short periods, identified no significant differences. *Doe, supra*, at 1394-95. Most importantly, the Court provided no analysis and no discussion of the significant differences in the types of facilities which exist in Kentucky and other states to support developmental disabled and mentally ill persons. This was a significant failure of the lower courts, which will be discussed further below.

In the *Cleburne* case, the Court applied the "rational basis" test to a discriminatory local ordinance, used to deny a special use permit for a group home for mentally retarded persons (13 men). The Court followed precedent in stating the general rule "that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Cleburne v. Cleburne Living Center, Inc.*, et al., 473 U.S. at 441; *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981). The Court stated further that "when social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude." *Cleburne, supra*, at 441. The majority in *Cleburne* stated that where

> individuals in a group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be.

Id., at 442. The lower courts in the present case have not given the State of Kentucky that latitude prescribed in *Cleburne* for enacting "social" legislation (establishing policies, programs, services, and procedures) for mentally retarded persons. The actual problems of caring for severely afflicted persons in our society are far greater than any vexations which may exist over due process or equal protection.

The Sixth Circuit Court remanded the case to the lower court to consider the requirements for judicial hearings. During this implementation phase and before final decision by the District Court, the Kentucky General Assembly in 1990 enacted House Bill 511, which amended the Kentucky statute for voluntary and involuntary admissions to ICF/MR facilities. See *Ky. Rev. Stat.* 202(B). In addition to making comprehensive changes in the commitment procedures, the Kentucky Legislature in HB 511 eliminated a provision in the statute which gave mentally retarded persons the same rights as mentally ill persons are given in *Ky. Rev. Stat.* 202A. At the time, the parties were negotiating a proposed "Agreed Final Compliance Plan." *Doe v. Cowherd*, 770 F. Supp. 354, 356 (W.D. Ky 1992).

Plaintiffs, *Doe* and the certified class, then contended that HB 511 denied the plaintiffs procedural protections. After considering Plaintiffs' motion for summary judgment and preliminary injunction (there has never been a trial in this extended case), the District Court ruled on several points, only two of which are basic points in the present case on certiorari: the required standard of proof for commitment of mentally retarded commitments and the statutory role of third parties in the MR commitment process. *Doe v. Cowherd, supra*, 770 F. Supp. at 358-59. On appeal, the Sixth Circuit Court upheld the District Court's ruling on the above two points, the Court again relying on its predilection to afford mentally retarded adults all of the procedural rights of mentally ill patients in commitment proceedings.

The Court of Appeals, as it did in *Doe v. Austin*, held that the State of Kentucky had not proven its assertions that there are great differences between mentally retarded persons and the mentally ill relevant to due process rights, that mentally retarded persons are "habilitated" rather than "treated," that facilities for the two groups are different (MR centers being less intrusive), and that there is more stigmatization with MI hospitals. VOR vigorously disagrees with this court decision, that the Commonwealth had failed to prove that the distinctions "have some relevance to the purpose for which the classification is made." *Id.*, at 1394; See *Bastromb v. Herold*, 383 U.S. 107, 112 (1966). The grounds for VOR objections to these findings are discussed below.

B. There was a "rational basis" for the distinctions made between mental retardation commitments and commitments for the mentally ill in the Kentucky statutes declared unconstitutional by the lower courts.

The last developmental disabilities statute which was enacted provides that there were over three million persons in this country who suffer from some form of developmental disability. *The Developmental Disabilities Assistance and Bill of Rights Act*, §101(a)(1), 42 U.S.C.S. 6000(a)(1) (Cum. Supp. 1992). The great majority of these people clearly have mild disabilities. One study showed the following breakdown:

Mild disabilities - 90%
Moderate disabilities - 6%
Severe disabilities - 3.5%
Profound disabilities - 1.5%

Lakin, *DeInstitutionalization of Mentally Retarded*, 314 Med. Sci. Law (1991) Vol. 31, No. 4. Clearly, most developmental disabled people suffer from mild or moderate disabilities. Most of these groups should not require the services of larger residential facilities, full-time.

Developmental disabilities occur in a myriad of forms. The kinds and severities of disabilities vary broadly. There are many people with afflictions like those of Tracy Horton. *Horton dep.* (R. 213, pp. 9-10, 11-12). There are those who have many of Tracy Horton's disabilities, but also have additional disabilities such as blindness. Some have her disabilities but do not have developed spines, or other critical body parts, making it impossible for them to even sit without supports. There are those with her mental disabilities who are hyperactive. It is possible for some parents, depending upon their personal circumstances, to care for severely disabled children for many years. But there is a broad class of disabled persons residing outside their homes (in community living arrangements and in larger facilities) whose families supported them at home until there were no family members able to do so.

A range of responses by service systems is required at certain times in the lives of disabled persons. State programs for handicapped persons, including medical treatment, training and other support services, should exist in ways to respond to the varied conditions of our disabled people. Larger congregate facilities, which serve those with the most severe handicapping conditions, are called developmental centers, state schools, or, as in Kentucky, MR (or DD) treatment centers. Whatever they are called, they serve the same function, to provide efficient, structured support for persons who cannot care for themselves and whose families are unable to do so.

It is customary for many parents to keep their severely disabled children at home during their early years, when they are small and easier to manage. In addition, there are more local support programs for the young, particularly educational programs. Mr. Thomas Horton described some of these programs, day care centers and a camp available to his daughter at an early age. There was a school which provided physical and occupational therapy, a dietary program, and training programs. The school ended when Tracy Horton reached twenty-one. *Horton dep.* (R. 213, pp. 13-14, 15-16).

Like many people who live in developmental centers, Tracy had almost no capacity for supporting herself. Her parents and family members did it all. When Tracy reached adulthood, she was far better served in the state treatment center. In addition to her direct care requirements, Tracy Horton had multiple medical needs, like many of those today who reside in the larger centers. Providing medical care for persons in these centers is far more efficient and effective than would be true in small community settings. *Horton dep.* (R. 213, pp. 18-19, 22-23).

It should not require much expert testimony to show the differences between persons suffering from mental illness, whose illnesses can in most cases be controlled by medication and therapy, and those suffering from mental retardation. In recognition of the substantial differences and support requirements, many states have created separate divisions of mental health and mental retardation services. In the early 1970's, mental retardation became part of a broader group designated by the federal government as "developmental disabilities," which included in addition to mental retardation, autism, cerebral palsy, and epilepsy. See *The Developmental Disabilities Assistance and Bill of Rights Act*, §102(5), 42 U.S.C. §6001(5) (Cum. Supp. 1992). It is generally understood that persons suffering from one or more of the four disabilities qualify under the DD definition, under three or more of the seven life activity areas. *Id.*, §6001(5)(D). This was an unfortunate grouping, as there are many differences (and varying degrees of involvement) within the group with developmental disabilities. The needs of those who can not function because of mental retardation are much different from those whose real handicaps are physical.

By failing to recognize the great differences which exist between mental illness and mental retardation and between those subgroups of people within each category and by failing to address the sharply different support requirements for each group and subgroup, the Sixth Circuit Court of Appeals and the United States District Court have fallen into a dark hole. The rulings of the lower courts demonstrate a misunderstanding of developmental disabled people and their needs. The rulings reflect an antiinstitution sentiment without expressing it. Otherwise, why should the Courts not even mention the various CLAs as places of commitment? CLAs for some people can be and are more restrictive than larger facilities. See *Pennhurst v. Halderman*, 612 F.2d 84, 107 (6th Cir. 1979), which found that institutionalization might be the least restrictive environment, the least restrictive available means of habilitation for some people. Downsizing and closure of larger residential facilities has been promoted by various groups who in general represent persons with substantially different kinds of disabilities than those residing in the larger facilities. VOR disagrees with the contention made by some groups that all people with disabilities can and should live and receive services in "community" settings.

It is generally recognized that for the past twenty or so years, our nation has undergone an intensive examination of the larger institutions. The words "institutions" and "community placements" are found throughout the cases in this field, particularly where institutional placements have been challenged. See. *e.g.*, *Lelsz v. Kavanaugh*, 210 F.2d 1040 (5th Cir. 1983) and 807 F.2d 1243 (5th Cir. 1987). The challenges to the very existence of larger facilities have been massive. It is in this light that the Kentucky statutes, as they have existed and have been amended during the past ten years, should be reviewed. The specter of a public defender assigned to represent Tracy Horton contesting the assignment of that child to the Hazelwood facility is a good example of the adversarial mood of our time. To some, institutions are to be avoided at all costs. The lower court decisions should be seen in that light.

The decisions of the District Court and the Sixth Circuit Court in this case reflect that obsession of some groups, and perhaps some professionals, against institutional care systems. VOR members and supporters (thousands of them) hold no aversion to our larger institutional facilities for mentally retarded persons. The word "institution" does not hold fear for parents whose children need the structured support of a larger facility. VOR contends that the national passion for closing institutions is passing, as it should.

Many professionals are realizing what parents have contended all along, that for many severely afflicted people larger residential facilities offer more opportunities for freedom and integration into the community than small homes; that larger centers offer centralized support, efficient organization, and space; and community living arrangements offer decentralized support and restricted space for some severely afflicted people. Providing the same level of care in community living arrangements as exists now at many larger residential facilities would be more costly if the same services were provided, because decentralized community living arrangements are less efficient. States save money only by cutting services; the service and support systems decline; and the disabled populations suffer for it.

Traditionally, persons with serious mental capacities — mental illness, severe retardation, or autism — lived at home, on the farm, or as was stated by the noted psychologist, Dr. Bernard Rimland, an expert on autism, they were left to "wander the streets of cities and towns, defending themselves as best they could from attacks by others, scrounging food from wherever they could find it, including the gutter, trying to find shelter from cold and snow." It was to create safe and humane environments for these unfortunate people that society created special places of refuge. Some of these persons had lived in local homes; many of these severely afflicted people had resided in the common jails, as many mentally ill persons do today. Rimland, *Community, My Foot!* Newsletter, Autism Society of Pittsburg, Vol. XVI-No. 2 (Fall, 1991).

One might conclude that advocates for deinstitutionalization have been simply uninformed of these realities. It is now apparent that the controversies and differences which exist are not based so much on misinformation, but upon different life visions. The attitude of one professional, John McKnight, is shown in a 1977 article, as follows:

> The surest indication of experience of community is the explicit knowledge of tragedy, death, and suffering. The managed, ordered, technical vision embodied in professional institutional systems leaves no space for tragedy; they are basically methods of production. Indeed, they are designed to deny the central dilemmas of life.

McKnight, *The Professional Service Business*, Social Policy 8(3) (1977). This passage was quoted in a recent book written by a director of the Pennsylvania Developmental Disabilities Planning Council. See Schwartz, *Crossing the River*, p. 165 (Brookline Books, 1992). The subject of the book is a new approach to addressing the needs of our disabled population, regardless of disability. The new vision is called "paradigm," which might be drawn from the "shifting paradigms" guru of the corporate world, a management methodology. The word is derived from ancient Greek, and it means of course "to show side by side," ergo, "model" or "pattern." The revelation in the paradigm approach is what many parents of severely impaired children have long recognized, that the alternative community systems are not working as was originally projected. The author of *Crossing the River* writes as follows:

> The new settings and the new "alternative" community system they collectively formed are now riddled with seemingly intractable problems. Task forces on finance, on abuse, on staff recruitment and retention meet urgently. Remedial actions are proposed. Yet underneath such actions lies a sense that the breakdown of our precious new settings is proceeding so rapidly that our efforts, redoubled though they might be, are insufficient and in vain.

ID., at 3. It can be seen that there is a loss of direction now, which has produced the new conception called "paradigm," to fill a void of disillusionment with the failure of the elaborate community system. Basically, the paradigm approach is to simply send the disabled children home with their parents or family, and if they cannot receive them, send them to foster care. The book contains much more, as the goal is true integration of all disabled persons into home and community, regardless of the disability. The paradigm vision is being actively promoted in some states.

How is this relevant in the present case? The decisions of the Sixth Circuit Court of Appeals, and the District Court reflect a basic misconception, that placement of persons in large residential facilities for mentally retarded persons are commitments to places of isolation and segregation; whereas, placement in community living arrangements (CLAs) represents freedom and integration. Not so say some in the avant-garde, for regulated CLAs also bring bureaucratic control, isolation, and enormous problems of appropriate care. VOR does not believe that the "big is bad" preconception, which underpins the decisions of the Sixth Circuit Court and the District Court, is accurate. The fact that the courts may never have received evidence on the real nature of the MR facilities in Kentucky (if the record does not show it) should be no basis for the Supreme Court to accept the decisions of the lower courts that the Kentucky statutes are unconstitutional because they do not give mentally retarded adults living in the larger facilities the same procedural rights which mentally ill adults are given under Kentucky law.

C. The standard of proof provided in the Kentucky statutes for commitment of mentally retarded persons, "clear and convincing," does not violate due process or equal protection standards.

Placing mentally retarded persons in a residential facility should not be seen as a commitment. Commitment of mentally ill persons has by statute become very complicated. As was seen in the tortuous situation imposed upon the Horton family in Kentucky, the detailed procedure of placing a mentally retarded person in a care facility should not require all of the procedural protections for those being committed to a mental hospital, which is usually a true place of confinement. Larger facilities for the mentally retarded are places of residence, offering opportunities for habilitation and training, as are community living arrangements. In Kentucky, residential centers for retarded individuals are designated as "treatment centers," but the terms normally used for MR centers are "habilitation" and "training." Confusion of these terms has complicated judicial and legislative resolution of problems presented in this case. The burden of proof required for commitment is one of those problems.

In the case of *Addington v. Texas*, 441 U.S. 418 (1979), the issue was what standard of proof is required by the 14th Amendment in a civil proceeding under state law to commit a person involuntarily to a state mental hospital. There was a jury trial, as provided by state law. The evidence showed that the subject suffered from hallucinations and often threatened to injure his parents and others. Two psychiatrists testified that he suffered from psychotic schizophrenia and that he was dangerous to himself and to others. He refused to attend out-patient programs. The trial court submitted the case to a jury on a "clear, unequivocal and convincing evidence" standard. The appellant, *Addington*, argued that the burden of proof should be "beyond a reasonable doubt." A commitment order was entered. The case was appealed, Appellant arguing that any standard of proof less than that required for criminal convictions violated procedural due process. The case was reversed by the Texas Court of Civil Appeals, and the Texas Supreme Court reversed the Court of Civil Appeals, relying upon a previous Texas state court decision, *State v. Turner*, 556 S.W.2d 563 (1977), *cert. denied*, 556 S.W.2d 563 (1977), *cert. denied*, 435 U.S. 929 (1978).

The Supreme Court explained the standard of proof required by the Due Process Clause as

> to instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication. *In re* Winship, 397 U.S. 358 (1970).

Addington, supra, at 329. The Court went on to discuss the three standards or levels of proof for different types of cases: preponderance of the evidence in typical civil cases between private parties, guilt of an accused beyond a reasonable doubt in criminal cases, and the intermediate standard, which is "clear and convincing" evidence. The Court noted that the "clear, unequivocal and convincing" standard of proof has been used "to protect particularly important individual interest in various civil cases." *Addington*, 441 U.S. 418, 425. The Court further stated as follows:

> In considering what standard should govern in a civil commitment proceeding, we must assess both the extent of the individual's interest in not being involuntarily confined indefinitely and the state's interest in committing the emotionally disturbed under a particular standard of proof. Moreover, we must be mindful that the function of legal process is to minimize the risk of erroneous decisions. See *Matthews v. Eldridge*, 424 U.S. 319 (1976)....

Addington, at 426. The Court held that the "clear and convincing" standard was "constitutionally adequate." *Addington*, at 433.

Addington was a mental illness case. Reasoning from the *parens patriae* power of the state to care for its citizens who are impaired by emotional disorders, the Court recognized the authority of states under their police powers "to protect the community from dangerous tendencies of some who are mentally ill." *Addington, supra*, at 427, 433. That is not the state concern for the mentally retarded. The questions are always whether the mentally retarded individual can in any degree support himself in the community and whether he or she would benefit most from residing in a larger residential facility or in a community living arrangement.

The burden of proof established by Kentucky law for MR commitments in H.B.511, §15(2), which is "clear and convincing" evidence, satisfies due process and equal protection. This intermediate standard was acceptable to the Court in *Addington* for mental commitments. It was the standard applied under Pennsylvania law by the District Court in *Clark v. Cohen, supra*, 613 F. Supp. at 698, the case which was persuasive to the District Court, (W.D. Ky.) in the present case on the due process issues. *Doe v. Austin*, 668 F. Supp. at 599-600.

II. THE SUPREME COURT SHOULD REVIEW THE DECISIONS OF THE SIXTH CIRCUIT COURT OF APPEALS IN THIS CASE AND SHOULD REVERSE BOTH 1988 AND 1992 DECISIONS.

Respondents filed a petition for writ of certiorari from the first decision of the Court of Appeals, and the Supreme Court denied the petition. *Doe v. Austin*, 848 F.2d 1386 (6th Cir. 1988), *cert. denied*, 488 U.S. 967 (1988).

A. The U.S. Supreme Court's denial of certiorari is not a favorable decision on the merits.

A denial of certiorari by the Supreme Court does not constitute an expression on the merits. *United States v. Shubert*, 348, U.S. 222, 228-229 (1955). Denial of certiorari by the Supreme Court does not ordinarily carry with it an implied approval of the ruling below. See, *e.g.*, *United Brick and Clay Workers of America, AFL-CIO, Dist. Council No. 11 v. Gladding McBean & Co.*, 192 F. Supp. 64, 66-67 (1961). Denial of writ of certiorari by the Supreme Court should carry with it no implication whatever regarding the Court's view on the merits of the case. See *Beck v. Winters*, 407 F.2d 125, 127 (8th Cir. 1969), *cert. denied*, 395 U.S. 963 (1969).

B. The first decision of the Court of Appeals for the Sixth Circuit is not *res judicata*.

An opinion of the Court of Appeals is not *res judicata* or conclusive, where after affirmance on a second appeal, a further appeal is taken to the United States Supreme Court. *Diaz A. et al. v. Patterson*, 263 U.S. 399 (1923). The Supreme Court could have reversed the first decision of the lower court in

Diaz, and it asserted that right; but then it held that the decision was correct. *Id.*, at 402.

The Supreme Court in the exercise of its appellate jurisdiction has the power not only to correct errors of law in the judgment under review, but also to make such disposition of the case as justice requires. *Tinder v. United States*, 345 U.S. 565, 570 (1953); *State of Minnesota v. National Tea Co.*, 309 U.S. 551, 555 (1940); *Honeyman v. Hanan*, 300 U.S. 14, 25 (1937); *Patterson v. Alabama*, 294 U.S. 600, 607 (1935).

The Court therefore should review both decisions of the Sixth Circuit Court, and for the reasons stated herein, should reverse the Sixth Court decisions that the Kentucky commitment statutes for mentally retarded adults violated due process and equal protection.

III. THE KENTUCKY STATUTE WHICH PERMITS PARENTS AND LEGAL GUARDIANS OF MENTALLY RETARDED PERSONS TO PARTICIPATE IN ALL ASPECTS OF INVOLUNTARY COMMITMENT PROCEEDINGS, DOES NOT VIOLATE EQUAL PROTECTION AND DUE PROCESS.

Parents and families possess special and unique insights into the needs of their own children, regardless of age, because of their experiences and family bonds. Parents and guardians are in a better position than many experts to present the countervailing arguments (and facts) to the broad challenge of deinstitutionalization, as was shown in the experience of Tracy Horton and her family. See *Horton dep.* (R. 213).

In *Parham v. J.R.*, 442 U.S. 584 (1979), the Supreme Court deferred to the role of professionals, noting that

> the questions are essentially medical in character: whether the child is mentally or emotion-

> ally ill and whether he can benefit from the treatment that is provided by the state.

442 U.S. at 609. The Court identified another problem in requiring a formalized fact-finding hearing, which "lies in the danger it poses for significant intrusion into the parent-child relationship." Parents are presumed to act in the best interest of their children, and requiring formal hearings could "exacerbate whatever tensions already exist between the child and the parents." 442 U.S. at 610. Both of the above considerations, deference to specialists and respect for parents, are pertinent considerations in the Kentucky case before this Court.

The *Parham* case involved a minor child, mentally ill, who was committed by the state. The extensive discussion in *Parham* of the rights of parents in commitment proceedings should apply to the parent-disabled adult child relationship, where the parent has been appointed guardian. One may use as an analogy the Supreme Court's comparison of the "untrained judge or administrative hearing officer" with "the medical professional." *Parham*, at 608. The parent/guardian in most instances knows more than the courts about his or her child. Surely, parents and guardians should be involved as parties in the commitment process.

The rights of parents in these matters are well-recognized. The District Court in *Baldridge v. Clinton*, 139 F.R.D. 119, 128 (1991) stated:

> The court cannot and will not assume that parents' opinions and wishes in this case are adverse to those of their children, absent a showing to the contrary. Parents and guardians have due process interests in the decision whether their own children and wards are placed in a community living arrangement or in a larger residential facility.

This decision was not limited to parents of minors. In *Baldridge v. Clinton*, a class was decertified for failing to satisfy Rule 23 requirements, and the due process rights of parents were recognized, following precedent. The Supreme Court has held that the fundamental liberty interest of natural parents "in the care, custody and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the state." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). See also *Ruffalo v. Civiletti*, 702 F.2d 710, 715 (8th Cir. 1983). The Court of Appeals for the Eighth Circuit has stated: "We can conceive of no more basic bond in American society, than the tie between parent and child." *Bohn v. County of Dakota*, 772 F.2d 1433, 1435 (8th Cir. 1985), *cert. denied*, 475 U.S. 1013 (1986). This right may be abridged only when the "demands of an organized society outweigh the parents' interest." *Youngberg v. Romeo*, 457 U.S. 307, 320 (1982).

Parents have a keen perception of what may happen if they are no longer allowed to speak for their adult children, once a decision is made to place the child in some residential facility, large or small. Parents are sensitive to the great deinstitutionalization movement for mentally ill persons, which removed most mentally ill people from state long-term care facilities. Parents have seen the many thousands of mentally ill people now residing in the streets of America, without proper care and support. Parents have seen that many of these people now reside in other institutions, jails and prisons. Parents have seen that some mentally ill persons now reside, inappropriately, in MR facilities, because there are no other choices for them. Parents have received so many assurances, so many promises, which they know have been proven wrong in the effort to bring about system changes. Parents of mentally retarded children recognize that MR residential centers should be pillars of systems for developmental disabilities services. They should be the focus of activity, supporting both persons who reside there and persons in the community who need temporary or respite care and support.

The court should rule that parents and guardians may participate in all aspects of commitment proceedingss for their children. This decision would inevitably strengthen the capacities of parents and guardians to work for system improvements for those in need of safe, secure, contributory and healthy environments.

In its landmark decision, *Youngberg v. Romeo, supra,* the Supreme Court held that the courts should show a certain deference to professional judgment in the placements of disabled persons. The lower courts in the present case, by making courts the primary decision-makers in individual cases, have disavowed *Youngberg*.

CONCLUSION

For the aforesaid reasons, Voice of the Retarded (VOR) and the other amici organizations which have elected to join this brief urge that the decisions of the United States Court of Appeals for the Sixth Circuit in 1988 and 1992 be reversed.

Respectfully Submitted,

VOICE OF THE RETARDED, ET AL.

BY: ______________________________
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NO. 92-351

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

LEONARD E. HELLER, SECRETARY,
KENTUCKY CABINET FOR HUMAN RESOURCES,

Petitioner,

V.

SAMUEL DOE, BY HIS MOTHER AND NEXT
FRIEND, MARY DOE, ET AL.

Respondents.

On Writ of Certiorari To The
United States Court of Appeals
For The Sixth Circuit

APPENDIX TO BRIEF
OF
VOICE OF THE RETARDED, ET AL,
AS AMICI CURIAE
IN SUPPORT OF PETITIONER

APPENDIX

Organizations joining VOR in this brief follow. (Organizations not members of VOR are shown with an asterisk).

ARKANSAS	Advocates for Human Development Center Residents
	Arkadelphia HDC Parents Group
	Booneville HDC Parents' Association
	Conway HDC Parents' Association
	Jonesboro HDC Parents Group
	Southeast HDC*
CALIFORNIA	Fairview Families & Friends, Inc.
	Lanterman Parents Coordinating Council and Friends
	Porterville Developmental Center Parents Group, Inc.
	California Association State Hospital Parent Council
	Green Line Parent Group, Inc. (Camarillo) Dev. Disabilities Center
	Association for Mentally Retarded at Agnews*
CONNECTICUT	Connecticut, Inc. (Friends of Retarded Citizens of)
	Southbury Training School (The Home & School Assoc. of)
FLORIDA	Haven Center, Inc.
	Spars/Parents and Relatives of Gulf Coast Residents
ILLINOIS	Beverly Farm Parent Association
	Brother James Court (Association for)
	Clearbrook Center
	Countryside Association for the Handicapped, Inc.
	Good Shepherd Manor, Inc.
	The Grove School Parent Council
	Happiday Center
	Illinois League of Advocates for the Developmentally Disabled
	The Lambs
	Lincoln Parents' Association for Retarded Citizens, Inc.
	Little Angels Parents Association
	Little City Parents Association
	The Meadows
	Waukegan Developmental Center Association for Retarded Citizens
	Dixon Association
	Jacksonville (Friends of the Developmentally Disabled)
	Ludeman Center (Parents and Friends)
	Kankakee Assoc. of Mentally Retarded (Parent Group of Shapiro Developmental Center)
	Friends of Choate*
	Fox Center Families and Friends*
	St Vincent Home for Children
	Mount St. Joseph Association
INDIANA	Parents & Friends of the Developmentally Disabled

IOWA	Citizens Advisory Board Glenwood State Hospital Parent Family Association New Hope Village Parents: Woodward State School-Hospital
KANSAS	Winfield State Hospital Parent Group
LOUISIANA	Alliance of Louisiana State School Hammond State School Parents Association Parents & Friends Club, Metropolitan Developmental Center* Northwest State School (Parents Assoc.) Family Assoc. Ruston State Developmental Center* Parents Assoc. Thibodaux State Developmental Center* Southwest Parents Assoc. Southwest Developmental Center* Pinecrest State School (Parents Assoc. of)* Parents Assoc. of Human Developmental Centers
MARYLAND	Coalition of Institutional Associations for The Mentally Retarded of Maryland Great Oaks Association, Inc. Holly Center, Inc. (Parents, Guardians and Friends of) Rosewood Center Auxiliary, Inc.
MASSACHUSETTS	Advocacy Network, Inc.* Fox Center Families & Friends* Wrentham State School* Boston Developmental Center* Hogan-Barry Parent Assoc.* Dever Assoc. for Retarded, Inc. Fernald League for Retarded Children, Inc. Massachusetts Coalition of Families and Advocates
MINNESOTA	Minnesota Chapter of Congress of Advocates for the Retarded, Inc.
MISSOURI	Missouri (Mental Retardation Association of — R.A.M., Inc.) St. Louis State School & Hospital, Inc. (Parents Assoc. of)
NEBRASKA	Beatrice State Developmental Center Mental Retardation Association of Nebraska
NEW JERSEY	North Jersey Developmental Center Parents Council
NEW MEXICO	Los Lunas Hospital & Training School Parents & Guardians Association
NEW YORK	Long Island Citizens Task Force on Aging
N. CAROLINA	Mental Retardation Assoc. of North Carolina, Inc.

OHIO	Anne Grady Center (Friends of) Boyd's Kinsman Home, Inc. Ohio League for Mentally Retarded Tiffin Developmental Center Parents and Volunteer Assoc. Broadview Parent and Friend Association
OREGON	Fairview Parents Assoc.*
PENNSYLVANIA	Altoona-Cresson-Edensburg PA League of Concerned Families of Retarded Citizens, Inc. P.I.E.R. (People Interested in Embreeville Residents) White Haven School (Relatives and Friends of) Elwyn Parent Staff Association, Elwyn, PA
TENNESSEE	TN Advocates for Developmental Center Options* Parent-Guardian Association of Arlington Developmental Center Parent-Guardian Assoc. of Cloverbottom Developmental Center Parent-Guardian Assoc. of Green Mountain Developmental Center*
TEXAS	Parent Association for the Retarded of Texas (P.A.R.T.), Representing 13 state schools and hospitals
UTAH	Mental Retardation Assoc. of Utah
VERMONT	Parents and Friends of Residents — Brandon Training School
VIRGINIA	Parents and Associates of The Northern Virginia Training Center-MR
WASHINGTON	Friends of Residential Centers for the Retarded Friends of Ranier, Inc. Yakima Valley School Parent Club (Friends of)
WISCONSIN	Northern Center Parents Organization Southern Wisconsin Center Parents Association St. Coletta School Wisconsin Parents Coalition Bethesda Lutheran Home

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The organizations shown have consented to join in the VOR *amici curiae* brief, and they claim the same interest in this case as does VOR. They are parent and guardian groups for specific developmental centers and training schools, and in some instances, they are state-wide parent-guardian associations.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LEONARD E. HELLER, Secretary,
KENTUCKY CABINET FOR HUMAN RESOURCES,
Petitioner,
v.

SAMUEL DOE, by His Mother and Next Friend,
MARY DOE, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit**

BRIEF OF THE AMERICAN ASSOCIATION ON MENTAL RETARDATION, THE ARC, THE ARC OF KENTUCKY, THE ASSOCIATION FOR PERSONS WITH SEVERE HANDICAPS (TASH), TASH OF KENTUCKY, THE AMERICAN ASSOCIATION OF UNIVERSITY AFFILIATED PROGRAMS FOR THE DEVELOPMENTALLY DISABLED, THE AMERICAN ORTHOPSYCHIATRIC ASSOCIATION, THE JOSEPH P. KENNEDY, JR. FOUNDATION, and THE AMERICAN CIVIL LIBERTIES FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

Amici curiae include national and Kentucky organizations of professionals and family members concerned with the services provided to people who have mental retardation.[1]

THE AMERICAN ASSOCIATION ON MENTAL RETARDATION (AAMR) is the nation's oldest and largest interdisciplinary organization of professionals working in the field of mental retardation.

THE ARC is an association of parents, family members, professionals and persons with mental retardation devoted to promoting the interests of people with mental retardation and their families. The ARC has a national membership of over 120,000 and is led by volunteer parents. THE ARC OF KENTUCKY is a state chapter of the ARC.

THE ASSOCIATION FOR PERSONS WITH SEVERE HANDICAPS (TASH) is an organization of over 8,000 teachers, parents, physicians and other professionals dedicated to developing educational and habilitative services for persons with severe disabilities. TASH OF KENTUCKY is a state chapter of TASH.

THE AMERICAN ASSOCIATION OF UNIVERSITY AFFILIATED PROGRAMS FOR THE DEVELOPMENTALLY DISABLED (AAUAP) is a national organization of university-based research, training, and model demonstration programs in the field of mental retardation.

THE AMERICAN ORTHOPSYCHIATRIC ASSOCIATION is an interdisciplinary organization of psychiatrists, psychologists, social workers, educators and allied professionals concerned with the problems, causes and treatment of mental disabilities.

---

[1] Petitioner and Respondents in this case have consented to the filing of this brief.

THE JOSEPH P. KENNEDY, JR. FOUNDATION, established in 1946, has as its objectives the prevention of mental retardation and the improvement of the way in which society deals with persons who have mental retardation.

THE AMERICAN CIVIL LIBERTIES UNION (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of individual liberty embodied in the Bill of Rights and this nation's civil rights laws.

Unlike the parties in this case, and unlike the *amicus* organizations supporting Petitioner, the organizations joining this brief take no position on whether the standard of proof selected by Kentucky for the commitment of people with mental retardation to residential institutions should be "clear and convincing evidence" or "beyond a reasonable doubt." Our organizations recognize that the Kentucky legislature could select the intermediate level of proof for both mental illness and mental retardation commitments. Similarly, the precise procedures by which parental opinions are ascertained in individual commitment cases in Kentucky are not the central concern of this brief.

Amici are deeply concerned, however, about the procedures by which individuals are admitted and committed to mental retardation facilities and programs. As a result, *amici* have a substantial interest in the doctrinal standards to be employed in evaluating the constitutionality of statutory schemes for the commitment of people with mental retardation to large residential institutions. The equal protection and due process issues raised in this case are matters of great importance to our organizations and their members. *Amici* are concerned that in resolving the relatively narrow constitutional questions presented in the grant of certiorari, the Court recognize the magnitude of the liberty interest of people with mental retardation and the complex considerations involved when a state chooses to grant procedural protections to one group that it denies to other similarly situated groups.

SUMMARY OF ARGUMENT

Civil commitment to an institution deprives people with mental retardation of an extraordinarily wide range of liberty interests. Not only do they lose their physical freedom, they also experience serious stigmatization, are likely to be involuntarily medicated with psychotropic drugs, and may face aversive behavior modification programs, physical abuse, and an institutionally-caused loss of crucial skills that they possessed before they were committed. Upon commitment they also lose their freedom to choose their daily activities and associates. People with mental retardation truly experience this as a massive curtailment of liberty.

Rather than issuing an advisory opinion on general and speculative constitutional issues, this Court should confine its ruling to the narrower questions in the writ of certiorari. We believe that the Kentucky statutes at issue violate the Equal Protection and Due Process Clauses, and that the opinion of the Court of Appeals should be affirmed.

CONTEXT OF THE CASE

Laws for the commitment of people with mental retardation were enacted at the same time that large institutions were developed to accomplish the lifelong segregation of a greatly feared population.[2] In many states, those laws, or major portions of them, remain on the books. There have been calls for reform of these laws to make them more responsive to our understanding of mental retardation and the rights of citizens who have that label. *E.g.*, A.B.A. Commission on the Mentally Disabled, *Right to Services, in Disabled Persons and the Law: State Legislative Issues* 409-52 (Sales et al. eds., 1982) (model statute). Progress toward achieving reform was initially slow, in part because litigation on behalf of institutional residents tended to focus on institutional conditions and deinstitutionalization rather than procedural protections. *See, e.g., Halderman v. Pennhurst*, 451 U.S. 1 (1981). By contrast, there was substantial litigation about the procedural rights of people with mental illness whose commitment was sought. *See, e.g., Addington v. Texas*, 441 U.S. 418 (1979); *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis 1972), *vacated and remanded*, 414 U.S. 473, *on remand*, 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated and remanded*, 421 U.S. 957 (1975), *reinstated*, 413 F. Supp. 1318 (E.D. Wis. 1976).

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[2] The background of these laws, including numerous historical examples, is set forth in the text and appendices to the *amici curiae* briefs to this Court by the American Association on Mental Deficiency (now AAMR) and by the Association for Retarded Citizens (now The ARC) in the case of City of *Cleburne v. Cleburne Living Center* (No. 84-468).

Currently, some states have no laws for the commitment of people with mental retardation, and treat all potential clients as "voluntary," regardless of their level of disability or their competence to give or withhold consent. *Cf. Zinermon v. Burch*, 494 U.S. 113 (1990). Other states have commitment laws on the books, but seldom use them, treating practically all commitments as "voluntary." This appears to have been the situation in Kentucky prior to this litigation. Pet. Br. at 10. A few states have adopted commitment laws for people with mental retardation and employ them regularly. *E.g.*, N.M. Stat. Ann. § 43-1-13 (Repl. Pamp. 1989).

Nationally, these procedural developments have coincided with substantial changes in the usage of the institutions themselves. As of 1991, 79,407 people lived in state mental retardation institutions, which represents a reduction of well over 50% from the 1967 figure of 194,650. (To put these figures in context, the 1991 total

is lower than the institutional population in 1936.) *See* Lakin, et al., *Longitudinal Change and Interstate Variability in the Size of Residential Facilities for People with Mental Retardation*, 28 Mental Retardation 343 (1990). (The above figures were updated for *amici* to June 30, 1991, by Professor Lakin and the staff of the Institute on Community Integration at the University of Minnesota.)[3]

One consequence of this decrease in population is that, starting in the 1970s, an increasing percentage of the institutional population were people with relatively severe disabilities. Nonetheless, a substantial minority continued to consist of individuals with what was then classified as mild or moderate mental retardation. *See* Scheerenberger, *Public Residential Facilities: Status and Trends*, 19 Mental Retardation 59 (1981). During the same period, mental retardation professionals developed remarkably successful techniques in community settings for serving people with mental retardation who need extensive or pervasive supports. *See* O'Neill et al., *The Impact of Deinstitutionalization on Activities and Skills of Severely/Profoundly Mentally Retarded Multiply-Handicapped Adults*, 6 Applied Research in Mental Retardation 361 (1985); Larson & Lakin, *Deinstitutionalization of Persons with Mental Retardation: Behavioral Outcomes*, 14 J. Ass'n for Persons with Severe Handicaps 324 (1989). It can now be said with confidence that there is no level or type of mental retardation that requires services or supports that are found only in an institution.[4]

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[3] *See generally* Lakin et al., *Longitudinal Patterns in ICF-MR Utilization, 1977-1986*, 27 Mental Retardation 149 (1989) (describing the ICF-MR program and providing state-by-state statistics on its implementation).

[4] For a discussion of the variety of community programs, *see* Hill & Lakin, *Classification of Residential Facilities for Individuals With Mental Retardation*, 24 Mental Retardation 107 (1986). The process of developing procedures for admission to community living arrangements is at a very early stage.

These factors have accelerated the trend toward closing the large (and costly) institutions by moving residents into community living arrangements. *See* Braddock et al., *The State of the States in Developmental Disabilities* 14-15 (1990). For example, Pennhurst, an institution which has occupied this Court's attention on several occasions in the past, is now closed. New Hampshire has recently become the first state to close all its mental retardation institutions, and several other states are scheduled to do the same in the next few years.

These developments make caution appropriate in reaching beyond the questions directly presented by the petition for certiorari. *Amici* believe that the development of case law in the lower courts and advances in our understanding about mental retardation services will provide assistance to this Court should these broader issues reach it in the future.

ARGUMENT

I. THIS COURT SHOULD REJECT PETITIONER'S REQUEST FOR AN ADVISORY OPINION ON ISSUES NOT PRESENTED IN THE PETITION FOR CERTIORARI.

This Court has not had occasion, to date, to address issues of procedural due process regarding the institutional commitment of adults with mental retardation. Unlike the procedures for mental health commitment, on which there has been a substantial body of scholarly exploration and case law for more than twenty years, commitment of individuals with mental retardation is an area that scholars, legislatures, and lower courts are only beginning to address. *Amici* urge this Court to avoid unnecessarily broad language or dicta in this case that might, by inadvertence, prematurely influence the appropriate resolution of these questions that are so vitally important in protecting the liberty of citizens whom

the state seeks to label as mentally retarded and to confine in large institutions.[5]

Petitioner and supporting *amici* have attempted to "smuggle" into this case much broader due process issues than those within the scope of the questions on which certiorari was granted. *Cf. Irvine v. California*, 347 U.S. 128, 129 (1954) (plurality opinion); Sup. Ct. R. 24.1(a). In effect, Petitioner asks this Court for an advisory opinion on the moot question of whether a since-repealed statute was constitutional prior to its repeal, *cf. Princeton University v. Schmid*, 455 U.S. 100, 102 (1982) (per curiam), and whether Kentucky's 1990 legislation was constitutionally unnecessary. Such advisory opinions would violate "implicit policies embodied in Article III." *Flast v. Cohen*, 392 U.S. 83, 96 (1968). *Amici* New Jersey et al. request an even more sweeping advisory opinion. They seek a declaration that *their* states' statutes, which have not even been considered in litigation in District Courts, and which may grant even fewer procedural protections of the liberty interest of people with mental retardation, would be found constitutional if they were challenged.

We believe the Court should reject these invitations to address issues not properly before it. Such a rejection is appropriate for all the reasons that led to the adoption of Rule 24.1(a). Petitioner's invitation would lead this

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[5] It is the understanding of *amici* that the scope of this case is limited, in the words of the Kentucky statute, to commitment to "an ICF/MR." Ky. Rev. Stat. Ann. § 202B.040(3) (Baldwin 1991). Thus the Court does not have before it constitutional questions about the protections required for placement in group homes or the many other forms of community living arrangements. Those latter placements involve different (but far from insubstantial) constitutional interests. *See generally* Valpey, *The Psychological Impact of 18 Years in a Board and Care Home,* 10 J. Community Psychology 95 (1982) (first person account); Smull & Harrison, *Supporting People with Severe Reputations in the Community* (Alexandria, Va., National Association of State Mental Retardation Program Directors, 1992).

Court into an uncharted area of substantial constitutional complexity not fully considered by lower courts and commentators. In addition, it is very possible that there are issues that may not require constitutional resolution at all, as they may be redressible under federal legislation. Some forms of discrimination between different groups of persons with disabilities may be prohibited by the Americans with Disabilites Act of 1990, 42 U.S.C. §§ 12101-12213 (Supp. II 1990), which has not yet received judicial interpretation. Thus, the availability of statutory relief may obviate the necessity of reaching equal protection issues.

In order to be of assistance to this Court, *amici* will address both the specific due process and equal protection questions upon which certiorari was granted and the more general constitutional and practical contexts in which they arise.

II. THE "MASSIVE CURTAILMENT OF LIBERTY" SUFFERED BY ADULTS WITH MENTAL RETARDATION WHO FACE CIVIL COMMITMENT SHOULD BE RECOGNIZED AS BEING AMONG THE WEIGHTIEST OF CONSTITUTIONAL INTERESTS.

In cases involving mental illness, this Court has repeatedly recognized that civil commitment involves a "massive curtailment of liberty." *Vitek v. Jones*, 445 U.S. 480, 491 (1980) (quoting *Humphrey v. Cady*, 405 U.S. 504, 509 (1972)). The case at bar represents this Court's first consideration of procedural questions involving the commitment of adults whom the state seeks to confine because of mental retardation. Although the questions upon which the writ of certiorari was granted are narrow, this case represents an important cornerstone in the constitutional structure that will protect the liberty interest of people with mental retardation.[6]

Relying on archaic stereotypes about people who have mental retardation, Petitioner and supporting *amici* have attempted to minimize the importance of this liberty interest. *Amici* AAMR et al. disagree. This brief will analyze the relevant liberty interests in light of the professional literature, as well as self-reports by individuals with mental retardation describing the experience of institutionalization.[7]

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[6] Kentucky's statutory definition of mental retardation closely tracks the American Association on Mental Retardation's (AAMR) previous version of the clinical definition. Compare Ky. Rev. Stat. Ann. § 202B.010 (Baldwin 1991) with AAMR, *Classification in Mental Retardation* 1 (Grossman ed., 1983). AAMR has recently reformulated the definition. Under the new definition, mental retardation

> refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.

AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports* 5 (9th ed. 1992). The two definitions are not significantly different regarding the level or nature of intellectual impairment. The principal difference is the replacement of the unitary concept of "adaptive behavior" with more specific analysis of an individual's particular skill limitations that result from the intellectual handicap. *See* note 8, *infra*. In the view of *amici*, the difference between these two versions of the definition has no relevance to the case at bar.

[7] Institutionalization of people with mental retardation, of course, involves a liberty loss much broader and deeper than mere physical confinement. Every citizen's liberty includes an almost infinite range of life's freedoms, seemingly mundane and trivial in isolation but invaluable in the aggregate, from deciding to take a walk in the woods on a weekend afternoon or calling a friend. People in mental retardation institutions lose those freedoms. This brief will focus on only a few aspects of that loss.

A. Commitment of Adults to a Mental Retardation Institution Constitutes a Loss of Physical Freedom Fully Equivalent to the Deprivation in Other Kinds of Commitment.

This Court has recognized every citizen's physical freedom as a fundamental right, both for equal protection and substantive due process analysis. *Foucha v. Louisiana*, 112 S. Ct. 1780, 1785 (1992); *United States v. Salerno*, 481 U.S. 739, 750 (1987). Even when compared to other rights which the Court has recognized as fundamental, freedom from physical confinement has been treated as *sui generis*, meriting greater constitutional protection. *See Lassiter v. Dep't of Social Services*, 452 U.S. 18, 25 (1981). The "'fundamental nature' of the individual's right to liberty," *Foucha*, 112 S.Ct. at 1785 (quoting *Salerno*, 481 U.S. at 750) is not reduced in any way because the individual whom the state is seeking to confine may have mental retardation. As one of the most distinguished leaders in the field of mental retardation observed, "There's nothing about retarded persons that should lead us to believe that they think less of their freedom than do other people." Blatt, *The Conquest of Mental Retardation* 832 (1987).

B. The Liberty Interest of Individuals at All Levels of Mental Retardation Is Equally Deserving of Constitutional Protection.

As this Court has noted, the label of mental retardation encompasses individuals with a range of levels of disability. *Penry v. Lynaugh*, 492 U.S. 302, 338 (1989); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 442 (1985).[8] People with different levels of disability may experience their liberty—and its loss—in different ways, just as all people experience liberty in individual ways. But it is constitutionally and philosophically unacceptable to place a lower value on a person's liberty because of the severity of his disability.

The limitations that are caused by the disability itself are, of course, not the product of state action. On first impression, it might appear that a person with a substantial disability has less liberty for the state to take away. But the constitutional impact of commitment does not consist of "counting up" the elements of freedom the state has taken away. This view would mean that locking up an individual who uses a wheelchair is a smaller liberty deprivation than locking up a nondisabled person, because the former couldn't walk anyway. It therefore would follow that under the balancing test of *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), fewer procedural protections would be required.[9]

The better view recognizes that the liberty deprivation is of equal constitutional weight regardless of the degree of an individual's disability. Thus, in our example, the individual who uses a wheelchair suffers a constitutionally equivalent liberty deprivation because the state has taken away 100% of his mobility rights outside the confines of the institution, just as it has taken away 100% from a marathon runner whom it has institutionalized. Similarly, an individual whose mental disability requires more extensive supports in various skill areas loses all the liberty that he would otherwise be able to enjoy, including choosing his own friends and companions, selecting daily activities, deciding what to eat, and retaining a level of personal privacy, among others. It is both futile and constitutionally impermissible to attempt a calibration, either fine or gross, of losses of liberty according to the severity of a person's disability.

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[8] Under the American Association on Mental Retardation's former system of classification, people with mental retardation were subdivided into four groups according to the severity of their intellectual disability: mild, moderate, severe, and profound. AAMR, *Classification in Mental Retardation*, *supra* note 6, at 13. AAMR has abandoned this subdivision based on intellectual functioning, as measured by IQ score. Thus the terms "mild," "moderate," "severe," and "profound" are no longer used. AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports*, *supra* note 6, at 34. The new classification system subdivides the class on the basis of an individual's intensity of needed supports. It uses the classifications "intermittent," "limited," "extensive," and "pervasive" to describe the support the person needs in a particular area. *Id.* at 26. For example, an individual's diagnosis under the new system might be "a person with mental retardation who needs limited supports in communication and social skills." *Id.* at 34.

[9] This same logical perspective would hold that the liberty interest of an arrested wealthy financier is worthy of greater protection than that of an indigent person because the former had more options for the enjoyment of his freedom, or that a person with a speech impediment has diminished rights under the First Amendment. To reduce constitutional protections on such a theory would surely violate equal protection principles.

Amici believe that by rejecting Petitioner's approach, the Court can assure that each individual's liberty is recognized (and protected) equally, and guarantee that invidious discrimination does not infect due process doctrine under the guise of "value judgments" that one citizen's freedom is "more valuable" than another's. *Cf.* Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (Supp. II 1990).

Petitioner also attempts to minimize the extent of the liberty deprivation inherent in commitment by implying that adults with mental retardation are not truly adults. The stereotype of individuals with mental retardation as "perpetual children" has long been part of the justification for what this Court has recognized as a "grotesque" history of mistreatment. *Cleburne*, 473 U.S. at 454 (Stevens, J., concurring); *id.* at 461 (Marshall, J., concurring in part and dissenting in part). *See* R. Dybwad, *Perspectives on a Parent Movement: The Revolt of Parents of Children with Intellectual Limitations* (1990). This Court has recognized that analogies between adults with mental retardation and nondisabled children have limited utility. *Penry*, 492 U.S. at 339 (O'Connor, J.).

In the past twenty years, at the urging of adults with mental retardation and their families, professionals have been reconsidering what adulthood means for people with mental retardation. These efforts have increasingly focused on the importance of facilitating the transition to adulthood, and governmental efforts have been directed toward the same goal. *See, e.g., Transitions to Adult Life for People with Mental Retardation—Principles and Practices* (Ludlow, Turnbull & Luckasson eds., 1988); McNair & Rusch, *Parent Involvement in Transition Planning*, 29 Mental Retardation 93 (1991); Wehman et al., *Transition from School to Work: New Challenges for Youth with Severe Disabilities* (1988); Individuals with Disabilities Education Act, 20 U.S.C.A. § 1401(a)(20)(D) (Supp. 1992). It would be inconsistent with constitutional norms to allow Kentucky to deny the adulthood of people with mental retardation and treat them as if they were children on the basis of "archaic and stereotypic notions" that may become "a self-fulfilling prophecy," *see* Dexter, *A Social Theory of Mental Deficiency*, 62 Am. J. Mental Deficiency 920 (1958); *cf. Mississippi University for Women v. Hogan*, 458 U.S. 718, 725, 730 (1982).

C. The Curtailment of Liberty Inherent in Any Commitment Is Exacerbated by the Likelihood that the Individual Will Be Subjected to Involuntary Medication with Psychotropic Drugs.

Contrary to Petitioner's suggestion, Pet. Br. at 32, the scope of the liberty interest at stake in a commitment to a mental retardation institution is magnified by the likelihood that the committed individual may be involuntarily medicated with psychotropic drugs. This Court has recognized the nature of the treatment that occurs during confinement is part of the measure of the liberty deprivation. *Vitek*, 445 U.S. at 492. The Court has also recognized that the involuntary administration of psychotropic medications is, in itself, "a substantial interference with [an individual's] liberty." *Washington v. Harper*, 494 U.S. 210, 229 (1990). Such medication practices have been held to require a substantial "overriding justification." *Riggins v. Nevada*, 112 S. Ct. 1810, 1815 (1992). "Mentally retarded people are among the most medicated populations in our society." Agran & Singh, *Pharmacological Intervention, in Handbook of Mental Retardation* 347, 348 (Matson & Mulick eds., 2d ed. 1991). The "unwanted side effects" of these drugs, *Riggins*, 112 S. Ct. at 1818 (Kennedy, J., concurring), can be particularly debilitating on the ability of people with mental retardation to learn and to cope with tasks in their everyday lives. *See, e.g.*, Plotkin & Gill, *Invisible Manacles: Drugging Mentally Retarded People*, 31 Stan. L. Rev. 637, 644-49 (1979) and studies cited therein.

Although these drugs have been developed for mental illness, their overuse in mental retardation institutions is alarming. A large percentage of institution residents are subjected to psychotropic medications. *See, e.g.*, Hill, Balow & Bruininks, *A National Study of Prescribed Drugs in Institutions and Community Residential Facilities for Mentally Retarded People*, 21 Psychopharmacology Bull. 279, 283 (1985) (37.9% of institutional residents receiving psychotropic medications, with only 2.9% prescribed for a medical condition and the remainder for "overactive behavior");[10] Intagliata & Rinck, *Psychoactive Drug Use in Public and Community Residential Facilities for Mentally Retarded Persons*, 21 Psychopharmacology Bull. 268, 270 (1985) (antipsychotic medications administered to 45% of institutional residents, with

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[10] *Cf. Riggins*, 112 S. Ct. at 1815 (requiring, *inter alia*, "a determination of medical appropriateness"). *See generally* Bates, Smeltzer & Arnoczky, *Appropriate and Inappropriate Use of Psychotherapeutic Medications for Institutionalized Mentally Retarded Persons*, 90 Am. J. Mental Deficiency 363 (1986) (between 39% and 54% of the prescribed medications are inappropriate for the conditions diagnosed).

the frequency unrelated to the clients' functional skill levels).

Thus there is a substantial likelihood that an individual committed to a mental retardation institution will be subjected to involuntary medication with psychotropic drugs.[11] This prospect adds weight to the already "massive curtailment of liberty" involved in civil commitment.

D. The Stigmatization of Civil Commitment and Its Official Attachment of the Label of Mental Retardation Is Keenly Felt by Individuals Committed to These Institutions.

Despite assertions by Petitioner and supporting *amici*, the stigmatization that accompanies mental retardation commitment has a substantial effect on committed individuals, and is at least equivalent in its impact to the stigmatization experienced by mental health patients.[12] *Cf.* Pet. Br. at 31-32. The impact of this stigmatization was first recognized in the professional literature at least a quarter of a century ago. *See* Edgerton, *The Cloak of Competence: Stigma in the Lives of the Mentally Retarded* (1967). This pioneering study revealed that individuals released from retardation institutions were so concerned about the stigma they encountered that many had fabricated lies to account for the time of their confinement. *Id.* at 148-49. Subsequently, the virulence of the stigmatization process for people with the label of mental retardation has been confirmed.[13]

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[11] Serious problems involving administration of psychotropic medications to institutionalized persons with mental retardation have also been found by lower courts, generally in the context of challenges under the Due Process Clause. *See, e.g., Thomas S. v. Flaherty*, 699 F. Supp. 1178, 1186-88 (W.D.N.C. 1988), *aff'd*, 902 F.2d 250 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 373 (1990).

[12] With both mental illness and mental retardation, some stigma will result from other individuals' perception of the disability itself. *See Addington*, 441 U.S. 418 (1979). This brief will address only the additional stigmatization caused by the commitment and the official attachment of the label of "mental retardation." *See* Reiss & Benson, *Awareness of Negative Social Conditions Among Mentally Retarded, Emotionally Disturbed Outpatients*, 141 Am. J. Psychiatry 88 (1984).

But the impact of stigmatization can be seen even more clearly in first person accounts by people with mental retardation about the role of commitment and labeling in their own lives. *See, e.g.*, Bogdan & Taylor, *Inside Out: The Social Meaning of Mental Retardation* (1982) ("The problem is getting labeled as being something. After that you're not really a person. It's like a sty in your eye—it's noticeable."); *"I've Seen It All!": Lives of Older Persons with Mental Retardation in the Community* (Edgerton & Gaston eds., 1991). *See generally* Stanovich & Stanovich, *Speaking for Themselves: A Bibliography of Writings by Mentally Handicapped Individuals*, 17 Mental Retardation 83 (1979).

E. The Massive Curtailment of Liberty that Accompanies Commitment Includes the Possibility of Aversive Conditioning, Potential Physical Abuse, Regression of Previous Skills, and the Loss of Freedom of Association.

Confinement to a regimented routine in an institutional setting affects almost every aspect of the freedom that

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[13] *See, e.g.*, Gibbons, *Stigma Perception: Social Comparison Among Mentally Retarded Persons*, 90 Am. J. Mental Deficiency 98 (1985); Angrosino, *Metaphors of Stigma: How Deinstitutionalized Mentally Retarded Adults See Themselves*, 21 J. Contemp. Ethnography 171 (1992); Zetlin & Turner, *Self-Perspectives on Being Handicapped: Stigma and Adjustment, in Lives in Process: Mildly Retarded Adults in a Large City* 93 (Edgerton ed., 1984); Szivos & Griffiths, *Group Processes Involved in Coming to Terms With a Mentally Retarded Identity*, 28 Mental Retardation 333 (1990).

This Court has already witnessed the impact of stigmatization of people with mental retardation on the unwillingness of a community to permit people with the disability to live in a group home. *Cleburne*, 473 U.S. at 448.

individuals ordinarily enjoy.[14] Civil commitment impairs not only the ability of individuals to move about freely but also a wide range of freedoms that affect almost every right imaginable. *See* Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives*, 70 Mich. L. Rev. 1108, 1158-61 (1972).

People in mental retardation institutions are often subjected to behavior modification programs that include aversive conditioning including seclusion and physical restraints. *See Lelsz v. Kavanagh*, 673 F. Supp. 828 (N.D. Tex. 1987), *rev'd on other grounds*, 824 F.2d 372 (5th Cir. 1987). *Cf. Vitek v. Jones*, 445 U.S. 480, 492 (1980). *See also Youngberg v. Romeo*, 457 U.S. 307, 317-25 (1982). They may also be the subjects for experimentation. *See, e.g.*, Rothman & Rothman, *The Willowbrook Wars* 260 (1984). An ironic consequence of institutionalization is that many people lose skills they had prior to commitment. *See generally*, *Romeo*, 457 U.S. at 327 (1982) (Blackmun, J., concurring).

Mental retardation institutions have also been the location of serious cases of physical abuse of residents. *See* Marchetti & McCartney, *Abuse of Persons with Mental Retardation: Characteristics of the Abused, the Abusers, and the Informers*, 28 Mental Retardation 367 (1990); Rothman & Rothman, *The Willowbrook Wars* 15-18; Woestendiek, *The Deinstitutionalization of Nicholas Romeo*, Inquirer: The Philadelphia Inquirer Magazine, May 27, 1984, at 18, 23 (serious beating by institutional staff following litigation in this Court).

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[14] A recent study for the National Association of State Mental Retardation Program Directors illustrates this point with a Swiftian proposal for governmental labelling, classification, and regulation of a group of nondisabled individuals. Smull & Harrison, *Supporting People with Severe Reputations in the Community* 5-6 (Alexandria, Va., National Association of State Mental Retardation Program Directors 1992).

Sadly, the intrusive infringements on liberty do not always end with release from civil commitment. For a disturbing example, *see* Ficker-Terrill & Rowitz, *Choices*, 29 Mental Retardation 63 (1991).

Each of these effects of commitment would be seen, correctly, as a substantial liberty deprivation if imposed by the state on nondisabled individuals. They are no less substantial when imposed on people with mental retardation.

III. THE LIBERTY INTEREST OF PEOPLE WITH MENTAL RETARDATION DESERVES RIGOROUS PROTECTION UNDER THE DUE PROCESS CLAUSE.

A. Procedures for Civil Commitment of People with Mental Retardation Must Assure a Fair and Accurate Adjudication of the Statutory Criteria.

The principal message of this Court's teachings on the procedural meaning of due process is that states must provide a fair and accurate adjudication of the statutory criteria for deprivations of constitutionally protected interests. This involves a balancing of competing private and public interests in light of the likelihood that requested procedural protections would increase the accuracy of the adjudication. *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976).

The first inquiry under *Mathews* is the nature of the individual's liberty interest. As indicated in the previous section, the interest of a person whom the state wants to officially label as having mental retardation and whom it wants institutionalized for a significant period of time is extremely weighty. The individual stands to lose, *inter alia,* the right to make choices about where he will live, with whom he will live, how he will spend his time, whether to be subjected to psychotropic drugs and aversive conditioning, whether he will have any degree of personal privacy, and whether he will face the stigmatization of the official label of "mental retardation" far beyond the duration of the commitment. Indeed, there are few things states do to citizens that affect an individual more profoundly and in more ways than commitment to a mental retardation institution.

The other factors in the *Mathews* balance can only be considered in the context of particular procedural protections that the state declines to provide but which the individual requests. Petitioner's request for an advisory opinion raises the question of whether there is a right to a hearing at all. The middle factors of the *Mathews* test would then inquire about the likelihood that a system with no right to a hearing will produce erroneous results, and the probability that the opportunity for a hearing would reduce the rate of errors. But before these factors can be analyzed, it is necessary to focus on what an "error" would mean. Errors, for constitutional purposes, refer to all false positives—cases where the commitment of an individual does not meet the statutory criteria for commitment. Thus, the constitutional question cannot be addressed in isolation from the statutory criteria.

Under Kentucky's statute, a person can be committed to an institution only upon a finding of each of these elements:

(1) The person is a mentally retarded person;

(2) The person presents a danger or a threat of danger to self, family or others;

(3) The least restrictive alternative mode of treatment presently available requires placement in an ICF/MR; and

(4) Treatment that can reasonably benefit the person is available in an ICF/MR.

Ky. Rev. Stat. Ann. § 202B.040 (Baldwin 1991).

Thus under the Kentucky statutory system, a finding of mental retardation alone would not be sufficient;[15]

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[15] If the statute permitted commitment on a mere finding of mental retardation alone, it would be of questionable constitutionality under the substantive meaning of the Due Process Clause. *Cf. O'Connor v. Donaldson,* 422 U.S. 563, 575 (1975) ("[T]here is . . . no constitutional basis for confining [mentally ill] persons involun-

there must also be a finding that the individual is prospectively dangerous, that there is no less drastic means of addressing this danger than confinement, and that available treatment is likely to be beneficial to the individual.[16] Thus, errors would include the mistaken commitment of an individual who did not have mental retardation (a relatively rare, but not unheard-of, occurrence).[17] But equally erroneous would be the commitment of an individual who *had* mental retardation but who posed no danger, or whose dangerousness (particularly in the form of reduced self-care skills) could be addressed by means less restrictive than institutionalization or for whom institutionalization was unlikely—on balance—to be beneficial. *See generally Clark v. Cohen*, 613 F. Supp. 684, 686-87 (E.D. Pa. 1985), *aff'd*, 794 F.2d 79 (3d Cir. 1986), *cert. denied*, 409 U.S. 962 (1986).

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tarily if they are dangerous to no one and can live safely in freedom.").

[16] Significantly, Petitioner omits several of the statutory criteria in his description of the Kentucky system, stating that "[t]he issues are whether the ward is mentally retarded and whether he can benefit from the available habilitation services CHR can provide." Pet. Br. at 26. Even wider of the mark is *amicus* New Jersey, who seeks to differentiate the purpose of mental retardation commitment from commitment for mental illness because the latter's purpose is "particularly to deal with circumstances where because of mental illness, a person is a danger to himself or others." N.J. *Amicus* Br. at 8-9. This is almost precisely the wording of Kentucky's mental retardation statute.

[17] *See, e.g.*, Valpey, *The Psychological Impact of 18 Years in a Board and Care Home*, 10 J. of Community Psychology 95 (1982); Turner, *Yes I Am Human: Autobiography of a "Retarded Career,"* 8 J. of Community Psychology 3 (1980); Edgerton, *A Case of Delabeling: Some Practical and Theoretical Implications*, *in Culture and Retardation: Life Histories of Mildly Retarded Persons in American Society* 101, 105 (Langness & Levine eds., 1986) (reporting eight cases of false labeling out of a group of 48 individuals diagnosed with mild mental retardation, as well as estimating that two California developmental centers discovered 50 such cases in 1980).

It is generally understood that due process requires a hearing for such a finding. *See generally Addington*, 441 U.S. 418. Indeed, this Court ordered substantial procedural protections in *Vitek*, 445 U.S. 480, for individuals whose liberty interest was substantially smaller than that of individuals proposed for mental retardation commitment. Plaintiffs in *Vitek* were already prisoners whose physical liberty was not at stake. By contrast, individuals in Kentucky who have not been committed are entitled to the full range of liberty interests enjoyed by all citizens.

B. The Kentucky Statutory Scheme at Issue in This Case Fails To Provide Adequate Procedural Protections.

The procedural question actually presented by this case is both narrower and more difficult than the necessity of a hearing for the involuntary commitment of an adult. The only due process issue properly in the case is whether it is permissible to grant the right to participate in proceedings "as if a party," and to confer "standing to appeal an adverse decision" to guardians and "immediate family members" when the liberty of an adult is at issue. Ky. Rev. Stat. Ann. § 202B.160(3).

In the resolution of this question, it is important first to note what it is not: this is not a question about the role of the parents of minor children. *Cf. Parham v. J.R.*, 442 U.S. 584 (1979). The individuals whose commitments are sought under the challenged statutes are not minors, and their parents, unless appointed as guardians in a judicial proceeding, have no more legal authority over their lives than do the parents of other adults.[18] The mere fact of an individual's disability (which, of course, has not yet been established at the stage of the proceedings under discussion) does not deprive him of the right to adulthood. Thus Petitioner's reliance on *Parham* as constitutional authority is misplaced.

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[18] The adults in this case whose parents seek their commitment are not analogous to the minor children in *Parham*. The closest analogy is Kenneth Donaldson, an adult whose parents sought his commitment. *O'Connor*, 422 U.S. at 565.

Legal questions aside, the relationship between adults who may have mental retardation and their parents is complex. As a starting point, it is clear that the majority of parents of adults with mental retardation care deeply about their sons and daughters.[19] As with the parents of nondisabled children, this interest does not end when the son or daughter becomes an adult. Many parents take an ongoing, caring, and sometimes intense interest in the welfare of their sons and daughters.

However, the interest of these parents may be manifested in very different ways. Social science research makes clear that for a substantial number of parents, concern about the future of their sons and daughters (and particularly their fate after the death of the parents) leads them to a strong bias toward institutionalization. *See, e.g.*, Frohboese and Sales, *Parental Opposition to Deinstitutionalization: A Challenge in Need of Attention and Resolution*, 4 Law & Human Behavior 1, 39 (1980). Such parents often resist community placement for their son or daughter. However, the "overwhelming majority of parents become satisfied with community settings once their son or daughter has moved from the institution, despite general predispositions to the contrary." Larson and Lakin, *Parent Attitudes About Residential Placement Before and After Deinstitutionalization: A Research Synthesis*, 16 J. Ass'n for Persons with Severe Handicaps 25, 37 (1991).

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[19] By contrast, some parents do not maintain contact after confinement and cannot even be located by the institutional staff. *See, e.g.*, Rothman & Rothman, *The Willowbrook Wars* 165 (1984). The language of the Kentucky statute grants the right to intervene to parents and other relatives regardless of their involvement with (or concern for) the individual whose commitment is sought.

If the due process question were whether parents should be given the authority to commit their adult son or daughter without a hearing, the high risk of error would require an independent hearing. But in the statute at issue in this case, Kentucky has given parents a different role. Parents, under the Kentucky statute, are treated as if they were parties and given specific authorization to appeal "any adverse decision." Granting parents such an intrusive role violates due process rights of their sons and daughters.

Parents clearly possess relevant information about their son or daughter that may aid the trier of fact in determining whether the individual meets the statutory criteria for commitment. In *Mathews* terms, procedures that assure that parents' information and perspective are brought to the attention of the decision-maker are acceptable because they reduce, rather than increase, the risk of error. Some features of Kentucky's statutory scheme can be viewed in this light. For example, parents may be members of the "interdisciplinary team" that makes service recommendations for the individual and can appear as witnesses at the commitment hearing and present evidence regarding their child's needs.

Other features of the statute appear not to be designed to permit parents to present relevant information, but rather to pursue directly their own interests "as if a party." In this category are the statutory rights to be represented by their own counsel and to cross-examine witnesses. Ky. Rev. Stat. Ann. § 202B.160(3). These features do not fit so easily within the *Mathews* format since their goal is not to affect the error rate in a dispute between two parties, but rather to bring the interests of another party to the proceedings. Thus, in structure, these provisions are more analogous to rules concerning intervention of right in civil litigation. Such intervention is limited to those with separate interests at stake that are not adequately protected by the existing parties. *See, e.g.*, Fed. R. Civ. P. 24(a). While parents have information relevant to Kentucky's commitment criteria, those criteria relate solely to the individual whose commitment is sought, and involve no separate interests of the parents.[20]

Surely a state could not grant party status and the ability to appeal an order of community placement to anyone who lives in the immediate neighborhood. But why would this violate due process? The *Mathews* test is not very helpful here, because the central problem is not that inclusion of such "parties" increases the likelihood of error. The real concern is that the parents, even though they might possess relevant information and care deeply about the respondent, are not the person whose liberty is at risk, and thus cannot be given a stake in the proceedings under the type of intervention rules that apply to ordinary disputes. *Cf.* Fed. R. Civ. P. 24. Could a state grant status "as if a party" in parental termination proceedings to every child's schoolteacher, granting the teacher the right to appeal an order denying termination? Such a teacher may care deeply for the child, and may have relevant information, but the parent's liberty interest must outweigh these considerations. *See generally Santosky v. Kramer*, 455 U.S. 745, 758-60 (1982).

Even further removed from the information-providing model is the provision that allows parents to appeal "any adverse decision." Ky. Rev. Stat. Ann. § 202B.160 (3). On its face, this provision might appear ambiguous: adverse to whom? But read in context, it semes likely that the legislature intended it to mean "adverse to the wishes of the parents." If the provision meant "adverse to the individual whose commitment is sought," parents would not have authority to appeal a denial of the com-

mitment petition. Thus the statute would grant to parents the right to appeal a decision for a community placement that both the individual and the state (and its mental retardation professionals) agree is lawful and in the individual's best interest. It is the constitutionality of this provision that is most troubling.

The balancing of interests here is somewhat different than traditional due process cases. A state statute grants to a third party the power to appeal a decision for a community placement which the affected party and the petitioner (who may be the state) find satisfactory. What is the parent's interest in such a scenario? It must be the desire to keep the adult in an institution because the parent believes it is a "better" place than the community placement, or, more likely, because such a parent is more comfortable envisioning it as a more permanent fixture, believing it to be an edifice unlikely to close in the future, when the parent is no longer able to look out for the adult son or daughter.

What is the interest of an adult with mental retardation in avoiding an appeal of a decision that is satisfactory to both the individual and the petitioner? In one sense the interest is in liberty itself—reducing the likelihood that the satisfactory decision that allows more freedom will be overturned because of political pressure or emotional arguments made by the parent. But in a very real sense, the interest is in autonomy. Few adults, whether disabled or not, want their parents, however lovingly-motivated, to continue controlling their destiny. An analogy might be found in portions of this Court's analysis of spousal consent and notification in abortion cases. The Court has noted the husband's "deep and proper concern and interest . . . in his wife's pregnancy and in the growth and development of the fetus she is carrying," but held it unacceptable to grant him a veto because a vital liberty interest of the pregnant woman was constitutionally superior. *Planned Parenthood of*

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[20] A decision made at the commitment hearing not to institutionalize does not necessarily mean that the individual must live with his parents. Community living arrangements, such as group homes, exist for individuals with mental retardation.

Central Mo. v. Danforth, 428 U.S. 52, 69 (1976). *See also Planned Parenthood of Southeastern Pa. v. Casey*, 112 S. Ct. 2791, 2831 (1992) ("A husband has no enforceable right to require a wife to advise him before she exercises her personal choices.")[21]

It is the adult whose commitment is sought who stands to suffer the "massive curtailment of liberty" described above. When he has not been adjudicated incompetent and when his parents have not been appointed his guardian,[22] those parents, however loving and well-motivated, have no "enforceable right" to govern his "personal choices." They can advise, they can provide information, but they cannot insist on their peace of mind taking precedence over their son's or daughter's right to liberty.

In the view of *amici*, Kentucky acted properly in providing parents a forum in which to provide relevant information and to make a case, including vigorous argument, about what they believe would be in their adult son or daughter's best interest. But Kentucky exceeded the bounds of due process when it permitted parents to intrude in the case, not to speak on behalf of their son's or daughter's interest, but instead to advance their own.[23]

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[21] The situation that presents the closest factual analogy to this provision would be if a state permitted third parties to appeal acquittals in criminal cases. Of course, such a case would never be decided as a matter of due process because it would involve other constitutional problems such as double jeopardy.

[22] This case does not present the issue of limitations on the power of guardians in the commitment of their wards. This is a question on which lower courts (and commentators) are in disagreement. It is clear that there are some issues that are so consequential or intensely personal that it would be impermissible to allow guardians to decide them for their wards, such as voting or selection of a marriage partner. Other issues may require a hearing before an impartial fact-finder, to assure compliance with statutory and constitutional criteria in cases involving fundamental liberties and to allow appellate review.

[23] The constitutional problems with this provision are even clearer when its imprecise scope is analyzed. The right to participate "as

IV. EQUAL PROTECTION REQUIRES THAT STATES ACT EVEN-HANDEDLY WHEN DEPRIVING INDIVIDUALS OF THEIR PHYSICAL LIBERTY.

People with mental retardation are not identical to people with mental illness, and the adjudication of commitment cases involving these two forms of disability need not be identical. For example, Kentucky employs an interdisciplinary team in the mental retardation commitment process but apparently does not do so in cases involving mental illness. *Amici* believe that states should be allowed reasonable latitude to devise procedures most likely to produce fair and accurate results based on the kinds of factors those cases involve.[24]

But the Equal Protection Clause imposes strict limits on the ability of the state to treat groups in substantially different ways when physical liberty is at stake. "Freedom from physical restraint being a fundamental right, the State must have a particularly convincing reason . . . for such discrimination." *Foucha v. Louisiana*, 112 S. Ct. 1780, 1788 (1992).

Clearly the Due Process Clause provides the principal measure of the constitutionality of procedural protections of liberty. On some occasions, this Court has declined to analyze differential treatment regarding procedural

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a party" is granted not only to parents and guardians but to all "immediate family members." Ky. Rev. Stat. Ann. § 202B.160(3) (Baldwin 1991). This term is undefined in the statute, and is not limited to family members who have any involvement in the life of the individual or who have previously expressed concern for him. At some point, there must be a due process limit to the ability of the state to grant party status to individuals other than the petitioner and the respondent.

[24] In other contexts, this Court has indicated that states are free to enact reasonable regulations of fundamental rights so long as they do not impair liberty interests for disfavored groups. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374 (1978).

rights under equal protection analysis, choosing instead to invalidate the laws under the Due Process Clause. *See, e.g., In re Gault*, 387 U.S. 1 (1967). On other occasions, it has used the Equal Protection Clause to require states to offer procedural rights to a group facing the loss of a fundamental right because the state has given those rights to another group, even when it is clear that the Due Process Clause would not have required the right be given to either group. *See, e.g., Douglas v. California*, 372 U.S. 353 (1963).[25] The equal protection challenge to Kentucky's different burdens of persuasion raises such an issue.[26]

In adopting the "beyond a reasonable doubt" standard for mental illness commitments, the Kentucky legislature has made a value judgment about the weight it wants to give to the liberty interest to be free from civil commitment. It was free to assign it a lesser weight, as measured by the burden of persuasion, but declined to do so.[27] Having made that judgment, it is not free to give lesser weight to the liberty interest of another group

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[25] As respected commentators have observed,

> When the government takes actions that burden the rights of a classification of persons in terms of their treatment in a criminal justice system it is proper to review these laws under the strict scrutiny standard for equal protection. However, it is often unnecessary to resort to equal protection analysis because the legitimacy of the law may be determined by the substantive interpretation of a specific guarantee of the Bill of Rights.

Nowak & Rotunda, *Constitutional Law*, § 14.41 at 890 (4th ed. 1991).

[26] *Amici* assume that this Court would find its due process analysis concerning mental illness, *Addington*, 441 U.S. 418, to be equally applicable in cases involving mental retardation.

[27] Kentucky's adoption of the "beyond a reasonable doubt" standard for mental illness commitments predates the *Addington* decision, but Petitioner indicates that the legislature has subsequently rejected attempts to lower the standard to "clear and convincing evidence." Pet. Br. at 28-29.

without "a particularly convincing reason." *Foucha*, 112 S. Ct. at 1788.[28]

This is an important principle. If states were free to protect the fundamental rights of some groups more rigorously than they protect others, it would be an invitation to "pick and choose" groups for greater or lesser protection of fundamental liberty interests based on their political clout, public disfavor, or stereotyped views. Kentucky's legislation does just that. Kentucky has chosen to endorse a "perpetual child" view of adults with mental retardation, and thus devalue their right to liberty. Similarly, the statute invalidated by the Court of Appeals appears to have been the product of political clout that individuals with mental retardation simply cannot match.[29]

Although states should be free to adopt different procedural details in commitment statutes for different groups, they must be supported by valid justifications and cannot amount to valuing the liberty of one group more highly than that of another, disfavored group. These principles require that Kentucky's use of different standards of proof be held to violate equal protection because, as the Court of Appeals found, the state has offered no such justification.[30]

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[28] Petitioner has argued that a smaller liberty interest is at stake in mental retardation commitments than in mental illness commitments. Pet. Br. 31-32. If anything, the individual interest at risk in mental retardation cases is greater than that in mental illness cases. The average duration of a mental retardation commitment is much longer, and may last, in Petitioner's words, "their entire lives." Pet. Br. 31.

[29] This Court has observed that the interests of people with mental retardation have, in other contexts, received a favorable hearing in some legislative bodies. *Cleburne*, 473 U.S. at 443-45. It is significant that those issues, such as entitlement to special education, are questions on which there is no potential conflict between people with disabilities and their parents. The reality is that legislation that addresses the needs of people with mental retardation is almost always the product of political action by parents and professionals in the field.

CONCLUSION

For the aforementioned reasons, *amici* urge the affirmance of the judgment of the Court of Appeals.

Respectfully submitted,

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January 11, 1993

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[30] Since *amici* believe that the parental provisions of the Kentucky law violate due process, we do not address whether they also violate equal protection. The state has offered no justification for allowing the parents in mental retardation cases to participate "as if a party" while protecting adults in mental illness cases from intervention by their parents and other relatives.

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IN THE

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OCTOBER TERM, 1992

LEONARD E. HELLER, SECRETARY,
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Petitioner,

v.

SAMUEL DOE, BY HIS MOTHER AND
NEXT FRIEND, MARY DOE *ET AL.*,
Respondents.

On Writ of Certiorari to the United Court of Appeals for the Sixth Circuit

BRIEF OF THE MENTAL HEALTH LAW PROJECT AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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Respondents.

On Writ of Certiorari to the United Court of Appeals for the Sixth Circuit

BRIEF OF THE MENTAL HEALTH LAW PROJECT AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS CURIAE*[1]

The Mental Health Law Project ("MHLP") is an independent non-profit organization that, for twenty years, has been devoted to the development of the law affecting people with mental illness and mental retardation. MHLP has written model laws, advocated protective legislation, and participated either as counsel or *amicus curiae* in virtually all civil cases concerning mental disability law that have come before this Court. MHLP submitted briefs as counsel for the plaintiff in *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975), concerning release of a non-dangerous patient in the absence of treatment; *Addington* v. *Texas*, 441 U.S. 418 (1979), concerning the standard for civil commitment of persons with mental illness; *Bowen* v. *City of New York*, 476 U.S. 467 (1986), concerning jurisdiction for class-wide challenges to Social Security Administration practices; and *Washington* v. *Harper*, 494 U.S. 210 (1990), concerning involuntary administration of medication to a prisoner. It has submitted briefs *amicus curiae* in many other disability law cases as well, including *Mills* v. *Rogers*, 457 U.S. 291 (1982), *Parham* v. *J.L.*, 442 U.S. 584 (1979), *Pennhurst State School* v. *Halderman*, 465 U.S. 89 (1984), *Board of Education* v. *Rowley*, 458 U.S. 176 (1982), and *Zinermon* v. *Burch*, 494 U.S. 113 (1990).

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[1] This brief is filed with the consent of the parties. Letters of consent have been filed with the Clerk.

INTRODUCTION

This case comes to the Court after more than ten years of litigation in the lower courts concerning the constitutionality of Kentucky's standards and procedures for the commitment and retention of adults with mental retardation in State residential facilities. The details of that litigation history are set forth in the briefs of the parties, and we shall not repeat them here. A brief review of that history demonstrates, however, that the issues that dominated this litigation were decided in an earlier stage of this case, as to which this Court denied certiorari, and as to which the State abandoned its objections by enacting a new statute largely reflecting the prior court decisions. What remains of this case are two procedural issues as to which, as we

demonstrate below, this Court improvidently granted certiorari.

When this case began, Kentucky law provided for the involuntary commitment of people with mental retardation under a statute that required the same rights and procedures as were applicable to people with mental illness. JA 91-93. Nevertheless, the State was admitting most people with retardation through allegedly "voluntary" commitment procedures, on the application of a parent or guardian. JA 50. In January 1986, the district court ruled, among other things, that the State must follow the involuntary commitment procedures applicable to people with mental illness, which required a judicial hearing, when committing adults with profound or severe retardation. JA 73.

In response, the State enacted House Bill No. 477 ("H.B. 477"), which eliminated the linkage between procedures for the commitment of people with mental illness and those for people with mental retardation. Instead, it specifically provided, in new Ken. Rev. Stat. Ann. § 202B.040(5), that commitment of people with mental retardation by their parents or guardians, following review by a newly-required interdisciplinary team, would be deemed "voluntary" rather than "involuntary." JA 75, 77. In November 1986, the district court, among other things, struck down the new provision as a violation of the Equal Protection and Due Process Clauses. JA 79, 88-89.

In 1988, the Sixth Circuit affirmed the district court's ruling that the commitment of adults with mental retardation by their parents or guardians must be considered involuntary, while affirming or reversing and remanding with respect to other district court rulings on the constitutionality of H.B. 477. *Doe* v. *Austin*, 848 F.2d 1386 (6th Cir. 1988)

(JA 90-91, 99-101).[2] This Court denied the State's petition for writ of certiorari. 488 U.S. 967 (1988) (No. 88-565).

In response, the State enacted in 1990 a substantial revision of the statutory provisions relating to the commitment of people with mental retardation. Among other things, the new law provides for the voluntary commitment of adults with mental retardation only if they are only "mildly or moderately mentally retarded" and, in the opinion of a physician, possess "the mental capacity to give informed consent for admission." H.B. 511, § 4(2), adding Ken. Rev. Stat. Ann. § 202B.021(2) (Michie Supp. 1992), JA 116, 120. All other adults with mental retardation must be committed through involuntary commitment procedures, which now require a judicial hearing. H.B. 511, § 9, adding Ken. Rev. Stat. Ann. § 202B.100 (Michie 1991), JA 124. No issue relating to these provisions remains in the case.

Another provision of H.B. 511 established "clear and convincing evidence" as the standard of proof in involuntary commitment proceedings for people with mental retardation. H.B. 511, § 15(2), adding Ken. Rev. Stat. Ann. § 202B.160(2) (Michie 1991), JA 128. Still other provisions permitted parents, guardians, and other third parties to participate as parties in involuntary commitment proceedings, with the right to appeal adverse decisions. H.B. 511 §§ 13, 15(3), 22, JA 127, 128, 132. Plaintiffs challenged these new provisions, as well as several others, and the district court struck these provisions down as unconstitutional. JA 160, 169-70.

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[2] The court of appeals also (1) reversed the district court's ruling that due process required a judicial hearing for involuntary commitment of adults with mental retardation, but affirmed the ruling that the procedures of H.B. 477 otherwise failed to satisfy due process; (2) affirmed the ruling that the Equal Protection Clause required a judicial hearing for involuntary commitment of adults with mental retardation; and (3) reversed the district court's ruling that due process required periodic judicial review of involuntarily committed adults but affirmed the ruling that equal protection required such review. JA 101-109.

In the decision brought here for review, the Sixth Circuit affirmed the district court in pertinent part. *Doe* v. *Cowherd*, 965 F.2d 109 (6th Cir. 1992) (JA 171). First, because Kentucky law continued to require proof "beyond a reasonable doubt" for the involuntary commitment of people with mental illness, the court ruled that the new provision requiring only proof by "clear and convincing evidence" for the involuntary commitment of people with mental retardation violated the Equal Protection Clause, because the State had failed to provide a rational basis for its distinction. 965 F.2d at 112-113, JA 174-177. Second, because Kentucky law did not authorize the participation of "third parties" in proceedings for the involuntary commitment of people with mental illness and provided no rational basis for this distinction, the new provisions authorizing such participation in proceedings for the involuntary commitment of people with mental retardation violated the Due Process and Equal Protection Clauses. 965 F.2d at 113, JA 177.

The State sought review of these two holdings -- and no others -- in its current petition for writ of certiorari, which this Court granted. Pet. i.

SUMMARY OF ARGUMENT

This Court should dismiss certiorari as improvidently granted.

A. The State's lead argument -- that Kentucky can constitutionally commit adults with mental retardation upon application of their parents or guardians without going through involuntary commitment proceedings -- was not presented in the petition for writ of certiorari and is, in any event, moot. That issue was decided by the Sixth Circuit in its prior 1988 decision, as to which this Court denied certiorari. It was not raised again in the current petition. Moreover, since the Sixth Circuit's 1988 decision, the State has substantially revised its statutes and no longer permits "voluntary" commitment of adults with mental retardation upon application of parents or guardians. Thus the State's argument concerns a superseded statutory regime. The State's emphasis on this argument strongly suggests that the State has little concern with the issues it did include in its petition and that therefore certiorari was improvidently granted.

B. A resolution by this Court of the constitutionality of Kentucky's lower standard of proof for the involuntary commitment of people with mental retardation than for those with mental illness would be of little significance in Kentucky or in other states. Since Kentucky refers to its "beyond a reasonable doubt" standard for people with mental illness as "unreasonable," "improvident[]," "inappropriate," "perhaps unwise[]," and a "mistake," Pet. Br. 29-30, the State manifestly has no serious interest in preserving the distinction and, indeed, may well correct the "mistake" without this Court's assistance. Moreover, the constitutional issue has little significance elsewhere, since no other state has the same distinction as Kentucky. Finally, Kentucky's distinction may be prohibited by the newly-enacted Americans with Disabilities Act.

C. Kentucky's statutes permitting participation of parents, guardians, and other third parties in involuntary commitment proceedings are so broad and vague, and the State's defense of them so cursory, that the constitutional question is neither clearly defined nor well-presented. A Supreme Court decision on such a record will inevitably affect the statutory commitment schemes of virtually every state, without the benefit of detailed briefing on the different statutory schemes of such states and without the benefit of a number of lower court decisions addressing such issues in

different contexts. The result may be to create more difficulties in the field, rather than to make it easier for states to make proper provision for the appropriate care, housing, and habilitation of people with mental retardation.

ARGUMENT

CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED

A. The State's Lead Argument Was Not Presented in the Petition and, in Any Event, Is Moot Because It Concerns the Constitutionality of a Superseded Statutory Regime.

The State's lead argument is that its admission of adults with mental retardation to certain residential facilities "as voluntary residents upon the substituted consent of their legal guardians and after independent professional review does not violate either Due Process or Equal Protection." Pet. Br. 20. As we show below, this issue is not properly presented, as it was omitted from the petition, and, in any event, is moot, as it concerns the constitutionality of a superseded statutory regime.

The latest district court and Sixth Circuit decisions in this case do not address the State's lead argument. That argument was rejected in the earlier Sixth Circuit decision in this case, where the court of appeals held that "the commitment of mentally retarded adults by the Commonwealth upon application by a parent or guardian is to be considered involuntary." *Doe* v. *Austin*, 848 F.2d 1386, 1392 (6th Cir. 1988) (JA 90, 101). Accordingly, the Sixth Circuit found unconstitutional Ken. Rev. Stat. Ann. § 202B.040(5), by which Kentucky "deemed admissions initiated by a parent or guardian to be voluntary, with no regard for the actual wishes of the committed person." 848

F.2d at 1392, JA 99-101.[3] It also rejected the argument that "the due process protections which are a part of the formal guardianship hearing, [Ken. Rev. Stat. Ann. §] 387.500 *et seq.*, vitiate the need for a hearing at the time of commitment," finding those procedures -- which might have occurred long before commitment -- to be "a poor substitute for a contemporaneous hearing." 848 F.2d at 1392 n.4, JA 101 n.4. The State sought Supreme Court review of these issues,[4] but this Court denied certiorari. 488 U.S. 967 (1988) (No. 88-565).

As a procedural matter, the State was entitled to present in its latest petition for writ of certiorari questions of continuing significance that were decided in an earlier interlocutory decision, despite the fact that this Court previously denied certiorari. See *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363, 365 n.1 (1973). But the State chose not to present again any question decided in the 1988 decision. Instead, it presented only questions decided by the Sixth Circuit in 1992 concerning the differing standards of proof for commitment of people with mental illness and those with mental retardation as well as the differing provisions regarding participation of parents and guardians in such commitment proceedings. This Court's almost invariable practice is not to entertain questions omitted from the petition for writ of certiorari and not subsumed within the questions presented. See Sup. Ct. R. 14.1(a). Kentucky's election not to renew its request for review of the 1988 decision should be conclusive.

Even if it had been properly presented, Kentucky's lead argument would still be inappropriate for consideration by this Court. In response to the Sixth Circuit's 1988 decision, Kentucky in 1990 substantially amended its commitment law for people with mental retardation. H.B. 511, JA 116. In particular, Kentucky repealed Ken. Rev. Stat. Ann. § 202B.040(5) -- the provision that the Sixth Circuit had found unconstitutionally deemed commitments initiated by parents or guardians to be voluntary. H.B. 511, § 7, JA 122. In its place, Kentucky added provisions expressly authorizing the voluntary admission of *minors* with mental retardation -- but not adults -- upon application of a parent or guardian. H.B. 511, § 4, adding Ken. Rev. Stat. Ann. § 202B.021 (Michie Supp. 1992), JA 120. The same provision authorizes the voluntary admission of a "mildly or moderately retarded adult person * * * who, in the opinion of the physician, possesses the mental capacity to give informed consent for admission." *Id.* There is no provision for the "voluntary" admission of adults with mental retardation who lack such capacity, even at the request of a parent or guardian.

In its petition, Kentucky conceded that its statutes no longer permit it to treat as a voluntary admission the commitment of an adult with mental retardation upon application of his or her parent or guardian. To the contrary, it admitted that the 1990 "sweeping revisions" of the statute brought "the Commonwealth's admission procedures for the mentally retarded into compliance with the Sixth Circuit's [1988] decision in *Doe* v. *Austin* and * * * address[ed] other issues that had arisen since the Commonwealth began utilizing judicial involuntary admission proceedings to authorize admissions to [its] mental retardation facilities." Pet. 6. The State further represented that only two issues remained -- the standard of proof and the participation of third parties. Pet. 6-7.

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[3] At the time of the 1988 decision, Ken. Rev. Stat. Ann. § 202B.040(5) provided:

> "The application by parents or guardians for placement for their retarded family member or ward in any mental retardation treatment center *shall not be considered an involuntary commitment under this section*, provided the retarded family member's application has been evaluated by an interdisciplinary team as defined in K.R.S. 202B.010 and the subsequent admission fully complies with the provisions of K.R.S. Chapter 202B." 848 F.2d at 1390, JA 96 (emphasis added).

[4] The pertinent question presented read: "Do admissions procedures of state residential treatment center for mentally retarded that permit guardian to provide substituted consent of his adult ward for admission to facility on voluntary basis violate Due Process or Equal Protection Clauses?" 57 U.S.L.W. 3319 (Nov. 1, 1988).

Thus, because Kentucky no longer permits admission of adults with mental retardation upon application of parents or guardians without a judicial proceeding, the issue decided by the Sixth Circuit in 1988 is now moot.[5] A ruling by this Court would directly affect the constitutionality of other States' commitment procedures for people with mental retardation, without the benefit of a full record, full briefing, and decisions below on the details of those state schemes.[6] This Court's past decisions on commitment procedures for people with mental illness show that such issues are difficult and require close attention to the details of the statutory scheme. *E.g.*, *Foucha* v. *Louisiana*, 112 S. Ct. 1780 (1992); *Zinermon* v. *Burch*, 494 U.S. 113 (1990). Even the states supporting petitioner as *amici curiae* are concerned about a

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[5] The State does not contend, and we believe cannot reasonably contend, that the 1986 district court judgment and preliminary injunction (JA 88) prevents it from again amending its law with respect to this issue if it chooses to do so. The 1991 district court judgment and preliminary injunction (JA 169), entered after plaintiff presented his objections to the 1990 law, appears to have superseded the 1986 order dealing with the previous law.

[6] For example, as we show below, some states permit admission of adults with mental retardation under their voluntary commitment procedures on application of a duly authorized guardian. See pp. 13-14 *infra* (describing Hawaii and Massachusetts procedures). See also Brief of the States of New Jersey, Indiana, Michigan, Minnesota, Nebraska, South Dakota, and Virginia as *Amici Curiae* in Support of Petitioner ("Br. of New Jersey *et al.*") at 13, 2a-4a (listing 33 states as authorizing admission by guardians).

broad ruling. See Br. of New Jersey *et al.*, at 15. This Court should decline Kentucky's request that it venture into these waters on this record.

Since the State's lead argument was not presented in the petition and, in any event, is moot, the Court could simply refuse to address that one argument but proceed with the remainder of the case. But we suggest that the Court go further and dismiss certiorari. The State's emphasis on this argument about superseded voluntary commitment procedures strongly suggests that it has little serious concern with the issues presented in the petition and thus properly before this Court. For this reason -- coupled with the reasons discussed below why the remaining issues are not suitable for Supreme Court review -- certiorari should be dismissed as improvidently granted with respect to the entire case.

B. A Ruling on the Constitutionality of Kentucky's Burden of Proof Would Be of Limited Significance.

Resolution of Kentucky's second question -- the constitutionality of a lower standard of proof for the commitment of people with mental retardation than for those with mental illness -- would be of limited significance for several reasons.

Most strikingly, this issue appears to be of little significance to Kentucky itself. The State characterizes its own "beyond a reasonable doubt" standard for people with mental illness as "unreasonable," "improvident[]," "inappropriate," "perhaps unwise[]," and a "mistake." See Pet. Br. 29-30. By these words, the State has virtually abandoned any reasoned defense of its differing standards of proof. While the State lists numerous differences between people with mental retardation and people with mental illness, it never explains why those reasons counsel in favor of a lower standard of proof for the commitment of people with mental retardation. For example, its contention that "[m]ental retardation is not subject to the same subtleties in diagnosis as mental illness," Pet. Br. 32, appears to support a *higher* standard of proof for people with mental retardation.[7] Moreover, Kentucky's characterization of its standard for the commitment of people with mental illness as a "mistake" shows that the State can solve its equal protection problem without involvement of this Court by simply amending that standard, without damage to significant State interests. The State's failure to defend its statutory scheme -- which the petition did not presage -- shows that certiorari was improvidently granted on this issue.

Moreover, Kentucky is apparently the only state that requires proof "beyond a reasonable doubt" for the involuntary commitment of people with mental illness and proof by "clear and convincing" evidence for the involuntary commitment of people with mental retardation. In *Addington* v. *Texas*, 441 U.S. 418, 431 n.5 (1979), this Court identified thirteen states and the District of Columbia as those jurisdictions having the "beyond a reasonable doubt" standard for people with mental illness. Of those fourteen jurisdictions, ten have switched to the "clear and convincing"

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[7] Other distinctions recognized by the State and its *amici* appear to support a higher standard of proof for people with mental retardation than for those with mental illness. Mental illness "can be and usually is successfully treated with modern medications." Pet. Br. 31. Thus, people with mental illness are usually committed to a hospital for a period of acute care and then, after their condition is stabilized, they are released. *Id.* By contrast, mental retardation is a relatively permanent condition, and those who are committed receive continuing custodial care, not treatment designed to cure or bring under control an illness. *Id.* See also Br. of New Jersey *et al.*, at 7, 10; Br. of The Concerned Families of Hazelwood Center, ICR/MR, Inc. (Louisville, Kentucky), *et al.*, as *Amici Curiae* in Support of Petitioner, at 9; Br. of Voice of the Retarded *et al.* as *Amici Curiae* in Support of Petitioner, at 5.

standard[8] and two have switched to a mixed standard.[9] Other than Kentucky, Massachusetts is the only state to retain the "beyond a reasonable doubt" standard for all issues in the involuntary commitment of people with mental illness, *D.L.* v. *Commissioner of Social Services*, 412 Mass. 558, 564 n.11, 591 N.E.2d 173, 176 n.11 (1992), but, unlike

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[8] See Idaho Code § 66-329(k) (Supp. 1992); Kan. Prob. Code Ann. § 59-2917(f) (Vernon Supp. 1992); Minn. Stat. Ann. § 253B.18 (West Supp. 1992); N.J. Stat. Ann. § 30:4-27.15 (West Supp. 1992); Okla. Stat. title 43A, § 5-401 (Supp. 1992); Or. Rev. Stat. § 426.130 (1991); Utah Code Ann. § 62A-12-234(10) (Supp. 1992); Wis. Stat. Ann. § 51.20(e) (West 1987); *In re Sanborn*, 130 N.H. 430, 545 A.2d 726 (1988); *In re Nelson*, 408 A.2d 1233 (D.C. 1979).

[9] To involuntarily commit people with mental illness in Hawaii, the state must prove beyond a reasonable doubt that the person is mentally ill, but need only prove by clear and convincing evidence (i) that the person is imminently dangerous to self or others or is gravely or obviously ill, and (ii) that the person is in need of care or treatment and there is no suitable available alternative that is less restrictive. Haw. Rev. Stat. §§ 334-60.2, 334-60.5(i) (1985 & Supp. 1991). Hawaii has no parallel procedure for the involuntary commitment of people with mental retardation. Instead, it permits the admission of adults with mental retardation upon application of a guardian who is specifically authorized to take that step. *Id.* § 333F-9(d).

To involuntarily commit people with mental illness in Montana, the state must prove its case beyond a reasonable doubt with respect to any physical facts or evidence, to a reasonable medical certainty with respect to mental disorders, and by clear and convincing evidence as to all other matters. Mont. Code Ann. § 53-21-126(2) (1991). Montana's procedure for the involuntary commitment of people with mental retardation is quite different. Commitment is allowed after recommendation by a "residential facility screening team" and the opportunity for a judicial hearing. *Id.* §§ 53-20-121, 53-20-125, 53-20-133. The statute does not specify the standard of proof applicable to either the screening team decision or the court proceeding.

The Sixth Circuit decision, of course, is not binding in either Hawaii or Montana, which lie in other Circuits. In any event, a Supreme Court decision on the constitutionality of Kentucky's distinction would not necessarily resolve the constitutionality of the different distinctions made by these other states.

Kentucky, Massachusetts does not have a parallel involuntary commitment procedure for people with mental retardation, Mass. Gen. Laws Ann. ch. 123B, §§ 5-7 (West Supp. 1992).[10] Thus it appears that any ruling on the constitutionality of Kentucky's distinction will have little relevance beyond Kentucky.[11]

Finally, Kentucky's distinction may be prohibited by the recently-enacted Americans with Disabilities Act ("ADA"). Since courts will generally seek to resolve cases on statutory grounds that avoid constitutional questions, *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J. concurring), the enactment of the ADA further diminishes the importance of the Sixth Circuit's decision on the constitutional question. Congress intended the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1) (Supp. II 1990).[12] Congress found, among other things, that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of

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[10] Massachusetts permits the voluntary admission of both adults with mental illness and adults with mental retardation upon application of a duly authorized guardian. Mass. Gen. Laws Ann. ch. 123, § 10(a) (West Supp. 1992); *id.* ch. 123B, § 6. Similar procedures, including court approval, apply to both groups. *Id.* ch. 201, §§ 6, 6A (West 1990).

[11] Michigan apparently uses the "clear and convincing" standard for involuntary commitment of people with mental illness and the "preponderance of the evidence" standard for the involuntary commitment of people with mental retardation. See Br. of New Jersey *et al.*, at 18 n.6. But since Michigan uses the "clear and convincing" standard for appointment of guardians for people with mental retardation, *id.*, it is not clear what practical difference the distinction makes.

[12] The relevant portion of the ADA, passed in 1990, became effective on January 26, 1992, long after the district court decision below. Pub. L. No. 101-336, § 205(a), 104 Stat. 338 (1990).

discrimination against individuals with disabilities continue to be a serious and pervasive social problem." *Id.* § 12101(a)(2) (Supp. II 1990). It also found that individuals with disabilities continually encounter various forms of discrimination including "overprotective rules and policies." *Id.* § 12101(a)(5) (Supp. II 1990). One of the means by which Congress effectuated that its overall purpose was through the following broad prohibition: "[N]o qualified individual with a disability shall, by reason of such disability * * * be subjected to discrimination by any [public] entity." *Id.* § 12132 (Supp. II 1990). The ADA defines the term "qualified individual with a disability" as "an individual with a disability who * * * meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." *Id.* § 12131(2) (Supp. II 1990). Individuals with mental retardation whom a state is trying to commit appear to fall within that definition. Retardation is a disability,[13] and in seeking to commit an individual with retardation, the State takes the position that the statutory requirements for receipt of the relevant state services are met. Thus the State's lower standard of proof for committing individuals with mental retardation than for committing those with mental illness may violate the ADA. If in fact it does, future cases will not present the equal protection issue. Dismissing certiorari would permit the lower courts in future cases to address the statutory question first.[14]

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[13] The ADA defines "disability" to include "a physical or mental impairment that substantially limits one or more of the major life activities," 42 U.S.C. § 12102(2), and the regulations provide that "mental retardation" is a "physical or mental impairment." See 28 C.F.R. § 35.104 (1992).

[14] Plaintiffs' complaint in this case included a claim of discrimination under § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1988), the precursor of the ADA. JA 12. This claim was never ruled on by the lower

(continued...)

C. The Constitutionality of Kentucky's Statutes Permitting Third Party Participation Does Not Warrant Supreme Court Review.

Certiorari should also be dismissed with respect to the final issue in the case -- the constitutionality of permitting the participation of "third parties" in proceedings for the involuntary commitment of people with mental retardation. As we show below, Kentucky's provisions are so broad and vague, and the State's defense of them so cursory, that the constitutional issues are not sharply focussed. A Court ruling in those circumstances could unintentionally and unnecessarily call into question procedures of other states.

The lower courts found unconstitutional three sections added as part of the 1990 revisions. One permits "[g]uardians and immediate family members" to participate in the proceedings "as if * * * part[ies]" and grants them "standing to appeal any adverse decision." H.B. 511, § 15(3), adding Ken. Rev. Stat. 202B.160(3) (Michie 1991), JA 128. Another permits "the Commonwealth, the individual who is subject to the proceedings or the individual's guardian, limited guardian, or other authorized representative" to appeal. H.B. 511, § 22, adding Ken. Rev. Stat. 202B.230 (Michie 1991), JA 132. The third section permits a "qualified mental retardation professional retained by the * * * respondent's parent or guardian * * * to witness and participate in any examination of the respondent and may submit findings, if any, to the court." H.B. 511, § 13, adding Ken. Rev. Stat. 202B.140 (Michie 1991), JA 127.

These provisions on their face permit a large, diverse, and ill-defined class of persons to participate as parties with appeal rights in commitment proceedings, even though the State has determined that these persons cannot make commitment decisions on behalf of adults with mental retardation.[15] The term "immediate family members" is not defined by statute, but presumably includes parents, siblings, and children, whether or not they have been involved in the person's care. The term may also include step-parents, half-siblings and others, again regardless of their actual contact with or responsibility for the person with retardation. A "limited guardian" may be a person with no authority concerning where his or her ward lives or what type of care he or she receives.[16] The term "other authorized representative" is not defined and could mean virtually anyone since the statute does not say who must authorize the representative.

The State neither adequately justifies these very broad provisions nor demonstrates that they will be narrowly construed. What it does instead is cite the case of a mother who took care of her daughter with retardation for some 20 years, was appointed her guardian in a judicial proceeding, and then sought to have the daughter admitted to a state facility. The State's apparent point is that such a parent-guardian should be able to participate in a commitment

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[14] (...continued)
courts. Future cases are much more likely to include and pursue claims under the ADA, because that statute manifests a strengthened national determination to eliminate discrimination against Americans with disabilities.

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[15] As explained in Part A, while Kentucky previously treated commitments of people with mental retardation at the request of their guardians as "voluntary" commitments, it no longer does so. Adults with mental retardation who lack the capacity to make their own decisions as to commitment may be committed only through "involuntary" commitment proceedings.

[16] A "limited guardian" is a "guardian who possesses fewer than all of the legal powers and duties of a full guardian, and whose powers and duties have been specifically enumerated by court order." Ken. Rev. Stat. Ann. § 387.510(4) (Michie Supp. 1992). Such a guardian may be appointed when a person is found to be only partially disabled in managing his or her personal affairs. *Id.* § 387.590(1) (Michie Supp. 1992).

proceeding because she would have to provide care for the child if commitment were denied. Pet. Br. 34-37. But that argument does not justify the breadth of the provisions, which permit participation of parents who may not have not seen their children in years, siblings who may not intend to take an active role in the care of their siblings with retardation, and certain unspecified "authorized representative[s]."[17]

The Sixth Circuit's decision therefore appears to be a holding that the State failed to justify its very broad statutory provisions, rather than a holding that a State can never permit *any* person other than the respondents themselves to participate in commitment proceedings or to appeal decisions in those proceedings. And since we are not aware of any state with a statutory scheme similar to Kentucky's, the Sixth Circuit's decision is not a sweeping ruling with wide-ranging impact. Moreover, the record does not even make clear what role parents and guardians have in Kentucky commitment proceedings as a result of the Sixth Circuit decision. It is unlikely that the State -- as the responsible party in an involuntary commitment proceeding -- intends to neglect or ignore the views of closely-involved parents or guardians. This decision, therefore, may have little practical effect in Kentucky.[18]

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[17] And as to why Kentucky includes these provisions for the commitment of people with mental retardation but not for the commitment of people with mental illness, the State simply says that the two groups are different. As in connection with the burden of proof issue, it does not explain why those differences justify different provisions. Pet. Br. 37-38.

[18] In fact, the Sixth Circuit's decision may not bar legal guardians with the full range of authority for their wards (as opposed to limited guardians) from appealing decisions in involuntary commitment proceedings. Despite the apparent breadth of the district court's order striking down H.B. 511 § 22 as unconstitutional (JA 169), we do not understand either party to take (continued...)

Although we know of no state with a statutory scheme similar to Kentucky's, many states do provide at least some role for parents and guardians in the commitment process. For example, as noted above, some states -- such as Hawaii and Massachusetts -- allow guardians to participate in commitment proceedings, because the state treats the admission of an adult with mental retardation at the request of a properly authorized guardian as a "voluntary" admission. See pp. 13-14 *supra*; Br. of New Jersey *et al.*, at 13. The appropriate role of parents and guardians in proceedings concerning the care of their adult children or wards with mental retardation is a difficult issue in general, and results in particular cases will depend heavily on the details of the state's statutory scheme and the manner in which that scheme is implemented. While the time may come when this Court will find it necessary to address the constitutionality of statutory schemes permitting or forbidding "third-party" participation in such proceedings, this is not the case in which to do so. A ruling by this Court in this case will inevitably affect the statutory commitment schemes of virtually every state, without the benefit of detailed briefing on those schemes and without the benefit of a number of lower court decisions addressing such issues in different contexts. A premature ruling by this Court is as likely to create more difficulties in a field that needs no further complications as it is to make it easier for states to provide for the appropriate care, housing, and habilitation of people with mental retardation.

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[18] (...continued)
the position that the court struck down that portion of § 22 which permits the individual respondent to appeal. Since guardians have broad authority to act on behalf of their wards, see Ken. Rev. Stat. § 387.660 (Michie 1991), Pet. Br. 7a-8a, a fully-authorized guardian may, for all the record shows, be able to appeal in the name of the ward.

CONCLUSION

For the foregoing reasons, the Court should dismiss certiorari as improvidently granted.

Respectfully submitted,

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In The
Supreme Court of the United States
October Term, 1992

Leonard E. Heller, Secretary,
Kentucky Cabinet for Human Resources,
Petitioner,
v.
Samuel Doe, by His Mother and Next Friend,
Mary Doe, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

AMICUS CURIAE BRIEF OF FOCUS ON COMMUNITY UNDERSTANDING AND SERVICES, INC. (FOCUS); PEOPLE FIRST OF NEBRASKA; PEOPLE FIRST OF RUSTON, LOUISIANA; PEOPLE FIRST OF TENNESSEE; AND PEOPLE FIRST OF WASHINGTON IN SUPPORT OF RESPONDENTS

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In The

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STATEMENT OF INTEREST

The groups filing this brief are part of the growing national movement of people with disabilities organizing to speak with a collective voice on their own behalf on issues directly affecting their lives. Our membership is composed entirely of people who have been labeled as having "mental retardation" or a "developmental disability." As will be evident from the materials presented in this brief, many of our members have been subjected to life in various institutions, and our members have strong feelings and opinions about how this has affected our lives.

Focus on Community Understanding and Services, Inc. (FOCUS), is an Ohio non-profit corporation established to be a self-advocacy group for people who are labeled as having "developmental disabilities." Its mission statement calls on FOCUS to empower people by:

1) Creating and sustaining a forum for an open exchange among people with disabilities and other interested persons;

2) decreasing dependency and increasing inter-dependency through enhancing productivity, and self-determination of citizens with disabilities;

3) promoting education in regard to issues facing people with disabilities and the continuing need for additional ongoing research and advocacy; and

4) promoting the development, maintenance, and provision of appropriate quality services.

To fulfill this mission, FOCUS conducts state wide training in advocacy skills of people labeled as having a disability, and prepares educational material for its membership and clients. It has also undertaken initiatives to improve the availability of employment activities for its clients.

Growing out of local chapters, some of which have existed since 1975, People First of Nebraska has been a statewide self-advocacy organization since 1985. Its members are all people who are labeled as "disabled." It conducts educational activities for its members; legislative advocacy on issues of concern; and sponsors and organizes an annual convention. People First of Nebraska has taken a formal position calling for the closure of the Beatrice (Nebraska) Developmental Center, a large state run institution for people labeled as having mental retardation.

People First of Ruston, Louisiana, was formed in 1983 by a group of people with mental and physical handicapping conditions who wanted their opinions heard concerning the types of services and treatment they were receiving. Its members include individuals who live independently, in large residential institutions, in community residential programs, and with their families. People First of Ruston provides training to its members on self-advocacy and their right to participate in the political process.

People First of Tennessee is a statewide advocacy organization in the state of Tennesse, where it exists as a non-profit corporation. It has over eight hundred members, all of whom are labeled as "disabled."

The purposes of People First of Tennessee are:

1) To promote the philosophy that everyone, no matter what disability he or she has or its severity, has the same basic civil rights and responsibilities;

2) to advocate and defend the rights of persons with disabilities in the areas of employment, education, housing, and transportation; and

3) to provide a way for persons with disabilities to express and remedy their concerns and enhance their well being.

In advancing these goals, People First of Tennessee has engaged in legislative and legal advocacy, *e.g.*, *People First of Tennessee, et al. v. The Arlington Developmental Center, et al.*, No. 3-91-1026 (M.D. Tenn., complaint filed December 12, 1991), as well as conducting training for members and other people labeled as having disabilities. In 1991, People First of Tennessee hosted a national conference of "self-advocacy" organizations, at which time a steering committee for a national group, Self Advocates Becoming Empowered, was established.

People First of Washington began as a local chapter in 1974. After statewide conventions in 1978 and 1979, the statewide organization was created in 1980, with 17 local chapters. It now has 36 local chapters in Washington. Its members are all people who are labeled as having a disability. Its membership also includes people with severe or multiple disabilities. People First of Washington provides training to its members in self-advocacy and employment rights. It works to increase public awareness and understanding of people with disabilities, to increase its members' involvement in the political process, and to advocate for additional services and against budget cuts. People First of Washington also sponsors an annual statewide "People First" conference.

Amici file this brief with the consent of the parties. The statements of consent are on file with the Clerk.

SUMMARY OF ARGUMENT

1) People with mental retardation are capable of meaningful self expression of their interests. Therefore, the courts below are correct to limit the authority of parents in institutionalization proceedings. While the intentions of parents may be benevolent, their interests are subordinate to the liberty interests of the person being committed. Studies show that family members are influenced by factors other than the needs of the adult with mental retardation when making the decision whether to institutionalize, and that parental bias in favor of institutionalization changes drastically when parents are made aware of non-institutional placements. Moreover, Petitioner's argument is premised on the stereotype that people with mental retardation are "perpetual children" and lack the ability for meaningful self-expression. A review of the available literature demonstrates that this premise is false.

2) *Amici* and their members are all potential subjects of involuntary institutionalization procedures, and agree with the court below that those procedures involve a significant loss of liberty. The history of such institutionalization is fraught with stereotyping, pseudo-science, and segregation, while currently a concensus exists that people with mental retardation should live in the community. The loss of liberty involves not only segregation from society, but also other deprivations of liberty, including the use of powerful psychiatric tranquilizers as chemical restraints. *Amici* and their members deplore this treatment of themselves and their peers.

ARGUMENT

This case presents important constitutional issues of equal protection and due process in the involuntary institutionalization of persons with mental retardation. These issues of law are well articulated in the briefs of Petitioner, of Respondent, and of the various other *amici curiae* in this matter. Less apparent in those briefs, however, are the personal concerns and abilities of the persons labeled as having mental retardation who face a loss of liberty through involuntary confinement in a state institution. It is imperative that this Court, in its consideration of this matter, take those concerns and abilities into proper account.

For reasons ranging from fear and aversion to paternalistic benevolence, our society has long treated persons labeled as having mental retardation as less-than-equal members of society.[1] One manifestation of this treatment

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[1] In passing the Americans with Disabilities Act, Congress made the following findings, codified at Title 42 U.S.C. section 12101(a):

* * * *

> (3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

* * * *

> (5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation,

has been a systematic physical segregation of persons with mental retardation into state institutional settings. Another has been to ignore the voices of persons with mental retardation who seek to speak for themselves in defense of their personal liberty, and to listen instead to the voices of family members who claim that persons with mental retardation are "better off" in environments that abridge their liberty.

This brief will seek to demonstrate that these practices should not be sanctioned by this Court, and that the courts below were correct in restricting state laws that perpetuated them.

I. IN VIEW OF THE CAPABILITY OF PEOPLE WITH MENTAL RETARDATION FOR MEANINGFUL SELF-EXPRESSION, THE COURTS BELOW PLACED PROPER LIMITS UPON THE AUTHORITY OF PARENTS IN INSTITUTIONALIZATION PROCEEDINGS.

While no one disputes the benevolent intentions[2] of most parents, family members, and guardians in institu-

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and communications barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities(.)

[2] The relationship between parents and their adult children labeled as having mental retardation is complex. No matter how benevolent the parents' intentions, an overly protective, relationship can result in a suppression of self expression on the part of the person labeled as having mental retardation. One person labeled as having mental retardation has described this as follows:

> My mother protected me—it wasn't wrong that she protected me, but there comes a time when someone has to come in and break them away. I can remember trying to be like the other kids and having my mother right there pulling me away—she was always worried about me. You can't force yourself to say to your mother, 'Stop, I can do it myself.' Sometimes I think the pain of being handicapped is that people give you so much

tionalization proceedings, primary consideration must be given to the interests of the person facing commitment as expressed by that person. Thus, the courts below were correct in finding that parents and guardians are "third parties" to the proceedings whose "interests may be adverse to the person facing commitment." *Doe v. Cowherd*, 965 F.2d 109, 113 (6th Cir. 1992). The interests of any person supporting the involuntary institutionalization of a person alleged to have mental retardation (with the loss of liberty inherent in such an outcome) and seeking to appeal a finding of the court that such confinement is inappropriate, are subordinate to the liberty interests of the person resisting the imposition of confinement.

Studies show that family members typically support (and generally initiate) the institutionalization process of their family member with mental retardation. While that position may be reached reluctantly, it is nonetheless influenced frequently by factors which have little to do with the actual needs or abilities of the person with mental retardation. For example, environmental factors such as stress within the family often trigger the request for institutional placement. Serious health problems of a caregiver family member often play a major role, as does the caretaker's advancing age. Black et al., *Individual and Family Factors Associated with Risk of Institutionalization of Mentally Retarded Adults*, 90 Am. J. of Mental Deficiency 271 (1985). The absence of available community-based residential options, such as super-

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> love that it becomes a weight on you and a weight on them. There is no way that you can break from it without hurting them—without bad feelings—guilt. It is like a trap because of the fact that you are restricted to your inner thoughts. After a while you resign yourself to it. The trap is that you can't tell them, 'Let me go.' You have to live with it and suffer. It has to do with pity. Looking back on it I can't say it was wrong. She loved me. You do need special attention, but the right amount.

R. Bogdan and S. Taylor, Inside Out: The Social Meaning of Mental Retardation 37 (1982).

vised or semi-independent living arrangements, often forces a family to seek placement of a person with mental retardation into a state institution. *Id.* at 275. Another study noted that "[s]tressors within the family, the burden of care, and disruption of family relations contributed significantly to the placement request process" for persons over twenty-one years of age. Tausig, *Factors in Family Decision-Making About Placement for Developmentally Disabled Individuals*, 89 Am. J. of Mental Deficiency 352, 358 (1985). Family size is also a factor, as larger families tend to initiate placement more readily than smaller families. Sherman, *Predictors of the Decision to Place Developmentally Disabled Family Members in Residental Care*, 92 Am. J. on Mental Retardation 344, 347 (1988). The same study showed that families with separated or divorced parents were more likely to seek institutionalization of a family member with mental retardation. *Id.* at 347-348.

Therefore, the courts in this matter were correct in finding that the interests of family members are not to be accepted routinely as equivalent to the interests of the person alleged to have mental retardation. This conclusion is even more justified when viewed in light of the degree to which family members' bias toward institutionalization changes when deinstitutionalization eventually occurs.

One study summarized its findings in this regard as follows:

> The majority of families of institutionalized persons are very satisfied with the institutional mode of care.
>
> The majority of families of institutionalized persons oppose deinstitutionalization.
>
> Consideration of deinstitutionalization is very likely to present a crisis for families, and this crisis is as intense as was the initial institutionalization.

Conroy, *Reactions to Deinstitutionalization among Parents of Mentally Retarded Persons*, in Living and Learning in the Least Restrictive Environment 141, 149 (1985).

Another study confirmed these conclusions, noting:

> Our data clearly reveal that the families of institutionalized persons with mental retardation are very much satisfied with current institutional placements. . . It is also possible that the reported level of satisfaction is at least partially attributable to the threat of unknown factors involved in community placement and the hypothesized need to justify a decision to institutionalize their relative many years ago. Parents, in general, do not have enough first-hand knowledge of community programs to enable them to endorse such placement for their son or daughter. Those who have expanded their knowledge base by visiting group homes tend to hold more favorable attitudes toward community placement.

Spreat et al., *Attitudes Toward Deinstitutionalization: National Survey of Families of Institutionalized Persons With Mental Retardation*, 30 Mental Retardation 267, 273 (1987).

The degree of initial family opposition to community relocation of their institutionalized family members with mental retardation, and the extent to which their minds are changed after viewing the results of deinstitutionalization, are systematically recorded in the most detailed and extensive study to date, involving the community relocation of residents of the Pennhurst facility in Pennsylvania. The Pennhurst Longitudinal Study: A Report of Five Years of Research and Analysis (1985). That study showed that prior to community placement of the Pennhurst residents, only 19% of the residents' family members strongly supported the community residential option; 55% of those family members strongly opposed the community placement. *Id.* at 180. After seeing the results of the community relocation, however, only 4% remained strongly opposed while a full 66% voiced strong support for the new placement. *Id.*

A similar change in attitude is reflected in regard to family members' satisfaction with care provided in state institutions. A 1989 survey reported that parents showed a mean level of satisfaction with the institutional setting of 90.1% while the person with mental retardation was still residing at the institution. After the person with mental retardation moved to a community residential placement, however, the parental approval of the former institutional care dropped in retrospect to 52.3%. The study noted:

> One possible explanation for this difference is that parents who have had the opportunity to see their family member in a small community living arrangement have a different frame of reference and a new perspective about the adequacy of the institution. Once having seen the nature of the community residences, the institution may not look as good as it once did.

Parent Attitudes About Their Daughter's or Son's Residential Placement Before and After Deinstitutionalization, Policy Research Brief, Nov. 1989, at 4.

In sum, this Court should view with some skepticism assertions by a state and by parent or family groups that parents and family members "know what is best" for adults with mental retardation and should be considered parties to the institutionalization process. In fact, there are many situations where family members are not able to determine what is best for their child, at least from the point of view of the child.

The courts below correctly reasoned that the parental relationship to a minor child which was decisive in *Parham v. J.R.*, 442 U.S. 584 (1979), was not controlling in a case involving adult offspring.[3] The Kentucky procedures at issue, unlike those in *Parham*, apply to adults alleged to have mental retardation subject to institutionalization, as well as to minor children.

Moreover, unlike *Parham*, the authority granted to third persons by the Kentucky statutes extends far beyond parents, encompassing all "immediate family members" as well as parents and legal guardians.[4] Such extension of family members' authority into the adulthood of the affected relative constitutes neither good law nor good policy—an adult facing confinement in an institution must overcome quite enough hurdles to defend his/her liberty interest without being forced to overcome the opposition of a family member operating "as if a party to the proceedings." KRS 202B.160(3).[5]

Petitioner's reliance upon the authority of *Parham* implicitly equates people with mental retardation and minor children.[6] This inherently assumes that people with mental retardation lack both decision-making capacity and expressive ability.

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[3] "'Once someone becomes an adult, one's parents lose that degree of authority found so crucial in *Parham*.'" *Doe v. Austin*, 848 F.2d 1386 (6th Cir. 1988), quoting *Clark v. Cohen*, 613 F. Supp. 684, 699 (E.D. Pa. 1985).

[4] *E.g.*, KRS 202B.160:

> (3) Guardians and immediate family members of the respondent shall be allowed to attend all hearings, conferences or similar proceedings; may be represented by private counsel, if desired; may participate in the hearings or conferences as if a party to the proceedings; may cross-examine witnesses if desired; and shall have standing to appeal any adverse decision. (Enact. Acts 1990, ch. 147, Sec. 15, effective July 13, 1990.)

[5] In their attempt to urge a paternalistic approach to this matter, Concerned Families of Hazelwood Center et al. repeatedly (and erroneously) characterize this case as involving "severely and profoundly retarded" persons. *Amicus Curiae* Brief of the Concerned Families of Hazelwood Center et al., at 1, 3, 5, 6, 7, 8, 9, 10, 11, 13, 18. In fact, the Kentucky statutes at issue apply equally to persons with mild, moderate, severe, and profound mental retardation. The District Court below found in its Memorandum Opinion of January 9, 1986, in this matter that of the eight residents of Kentucky's institutions for persons with mental retardation at that time, one hundred residents were persons with mild or moderate mental retardation. Joint Appendix of Petitioner and Respondents, at 64. Since that time, the actual numbers may have changed but the statutory language remains all-encompassing.

Those who are labeled as having mental retardation constantly face the stereotype, pervasive throughout our entire society, that people with mental retardation are "perpetual children," incapable of structuring their own lives or even of knowing what they want in their lives. That stereotype, more than any other, works to deprive people with mental retardation of the fundamental right of personal autonomy taken for granted by other adult citizens of this nation.

In fact, we, the members of the *amici* organizations here, do know what we want in our lives; we ask only that our voices be heard as the voices of other adults are heard when life choices are made. Not all of us can communicate our thoughts in sophisticated ways, but each of us can communicate.

Amici members all have an interest in what has come to be known as "quality of life". One person labeled as having mental retardation, Connie Martinez, has stated it this way:

> So the first thing for the professionals and the parents to understand is that we can have a good quality of life if we have control over our own lives and if we have the help we need to keep that control and independence in our own lives. We don't need KEEPERS, we need TEACHERS.

Martinez, *A Dream for Myself*, in Quality of Life: Perspectives and Issues 1, 4 (1990) (emphasis in original).

Many professionals have gradually accepted that philosophy. One such professional has written:

> Quality of life is a matter of consumer (i.e., "consumer" of mental retardation services) rather than professional definition. Quality of life issues should be defined by consumers and other citizens rather than by professionals in the field. Ultimately it is how the individual perceives and evaluates his own situation, rather than how others see him, that determines the quality of life he or she experiences.

Schalock, *Preface* to Quality of Life: Perspectives and Issues, *supra* p. 12, at x.

It is apparent that persons with mental retardation have something to say about the topic of confinement in institutions, and are becoming more vocal in expressing their thoughts and feelings. Sometimes they speak on a collective level, as with the following resolution from a national organization of persons with disabilities, Self-Advocates Becoming Empowered:

> The National Self-Advocacy Steering Committee understands that People First of Tennessee has filed a lawsuit against the State of Tennessee to close the institution at Arlington, TN. We agree that their case is a strong one. A number of us have been in institutions where we were hurt physically and emotionally. Our members have had experiences where we were tied up in restraints, pulled by our hair, lemon juice squirted in our faces, electric shock used on our bodies to control us so that we would be knocked out on medication. Emotionally we had no privacy in showers and in the restrooms, we were left in our bed all day with nothing to do. We were denied relationships with men and women. We were never allowed to make choices and decisions for ourselves and never knew that we could. We stand behind People First of Tennessee 100 percent. We need to see more money out of the institutions and supporting people to live in their own place and having the opportunity to work. The State of Tennessee should spend the money for people with disabilities in the community and not for institution places.

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[6] Brief of Petitioner at 22.

Legislative Committee Report, adopted by National Self-Advocacy Steering Committee, Self-Advocates Becoming Empowered (December 4, 1992).

At other times they speak as individuals. Roberto Reyes, a person labeled as having mild mental retardation who spent eight years in an institution for persons with mental retardation, described his experience:

> Being there years in a place like that, it gets anybody down. It's not like being in jail. In jail, you go to jail and you know when you're gonna get out, but being in an institution you don't know when you're going to get out. I wanted to get out . . . and the only way I could get out of there was by getting sterilized.

Ward, *"I've Seen It All! . . . Well, Just About All,"* in "I've Seen It All!" Lives of Older Persons with Mental Retardation in the Community 71, 75-76 (1991).

Some persons with mental retardation must use non-verbal methods of communication to tell people what they think, but can still express themselves, if others have the patience to listen. Even those with the label of profound mental retardation can communicate how they feel about being sent to institutions. Nicholas Romeo, a person labeled as having profound mental retardation and plaintiff in the landmark case of *Youngberg v. Romeo*, 457 U.S. 307 (1982), who resided at the Pennhurst facility in Pennsylvania, was described by the institution's psychologists upon his admission to the facility in their report as follows:

> He was toilet-trained, they noted, had learned his way to the bathroom and dining room, and had started approaching the Pennhurst aides, taking their hands and guiding them out of the ward.
>
> "The only way of expressing his needs and desires is one of taking another's hand and pulling him out. This seems to mean 'going away' rather than going out."

Woestendiek, "The Unwitting Revolutionary of Pennhurst", The Philadelphia Inquirer Magazine, May 27, 1984, at 18, 21.

Aversion to institutional confinement is a consistently recurring theme in the self-expression of persons with mental retardation. The most frequent description of institutional life is a comparison to jail. In describing how former residents of an institution for persons with mental retardation pursue recreational activities in the community, one study noted:

> Another central concern for the former patients is the use of leisure time. The ex-patients pursue "recreation," or just plain "fun," with a single-mindedness that is impressive. The former patients themselves trace their relentless pursuit of happiness to their long history of being deprived of the right to seek leisure-time pleasures when and how they wished. They speak of lives—before hospitalization—of restricted recreation, and they shudder at the memory of their hospital years, during which they always felt controlled, scheduled, and restricted: "We was always cooped in and pushed around. We couldn't do what we wanted in that place. It was like a jail with all them rules and locks on the doors." The freedom of life in the community intensifies the search for "fun," for the full and free use of leisure time. To fill spare time with "fun" is a central focus for the discharged ex-patient. As one man phrased it: "I feel like I got a right to fun now that I'm out, to make up for all the years I was in that place."

R. Edgerton, The Cloak of Competence—Stigma in the Lives of the Mentally Retarded 126 (1967).

Thus, the premise underlying Petitioner's argument, that persons with mental retardation lack capacity or the expressive ability to make decisions regarding institutionalization, cannot withstand a review of the available literature, which demonstrates the abilities and concerns of persons with mental retardation in this area. The sounder proposition is to protect as paramount the interest of the person with mental retardation in exercising judgment over and control of these decisions.

II. INSTITUTIONALIZATION INTRUDES UPON VALUED LIBERTY INTERESTS.

As persons with mental retardation, we, the members of the organizations filing this brief, are potential subjects of involuntary institutionalization procedures. *Amici* believe that the court below was entirely correct in ruling that "[t]he mentally ill and mentally retarded are identical insofar as they lose their personal liberty by involuntary institutionalization." *Doe v. Cowherd*, 965 F.2d 109, 113 (6th Cir. 1992). Courts and professional researchers alike have confirmed the importance of this loss of liberty.

It is beyond dispute that involuntary commitment to an institutional setting entails a significant deprivation of liberty.[7] It is by no means inappropriate that a state entity seeking to deprive a person of a liberty interest be held to a high standard of proof to effect that deprivation. Petitioner would have this Court believe that the safeguard against unwarranted confinement offered by the "beyond a reasonable doubt" standard of proof actually "penalizes"[8] and "burdens"[9] the person whose liberty interest is in jeopardy. Petitioner's implicit assumption is that liberty is unimportant to persons with mental retardation. *Amici* wish to emphasize to the Court that that assumption is fundamentally and frighteningly wrong.

The history of the institutionalization of persons with mental retardation is also a history of society's attitudes towards persons with mental retardation. In colonial times persons with a variety of disabilities were cared for by their families. In that more agrarian, less technical age prior to urbanization and industrialization, persons with disabilities were more easily assimilated into the daily life of the general population. The nation's first institution specifically for persons with mental retardation opened in Massachusetts in 1848. Early institutions were few (there were only ten in the nation by 1880), and were largely devoted to humanitarian care and training.

The latter part of the nineteenth century witnessed a profound change in how society, and the professionals of the time, viewed people with disabilities, especially those who were then called "feebleminded."[10]

> In attempting to understand and explain the social problems of their times, social theorists . . . began to apply evolutionary theory to the development of society. The cause of the spread of poverty, crime, immorality, and other social evils throughout society, they reasoned, was the proliferation of people with defective genes. The feebleminded gradually came to be singled out as especially dangerous carriers of social disease. These theories were translated into a program of social action known as the eugenics movement.

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[7] *Addington v. Texas*, 441 U.S. 418, 425 (1979) ("civil commitment for any purpose constitutes a significant deprivation of liberty"); see also *Humphrey v. Cady*, 405 U.S. 504, 509 (1972), describing psychiatric commitment as a "massive curtailment of liberty"; see also *Vitek v. Jones*, 445 U.S. 480, 493 (1980) (even a person convicted of a crime has a protected liberty interest in regard to involuntary institutional care).

[8] "The Equal Protection Clause does not require that the mentally retarded be penalized by an inappropriate standard of evidence in their involuntary commitment proceedings simply because a State has improvidently required the inappropriate criminal law standard for its mentally ill." Brief for Petitioner at 19-20.

[9] "The difference in the standards of evidence imposes no burden upon the mentally retarded. Rather, it simply frees them from a burden which was imposed unnecessarily, and perhaps unwisely, upon the mentally ill." Brief for Petitioner at 30.

[10] Persons with mental retardation have been labeled "idiots", "morons", "imbeciles", "feebleminded", "mentally deficient", "mentally defective", and "mentally retarded."

Taylor and Searl, *The Disabled in America: History, Policy, and Trends*, in Understanding Exceptional Children and Youth 5, 13 (P. Knoblock ed. 1987).

In a manifesto of this eugenics movement one "charitable" organization of the time, the American Breeders Association, wrote in 1913 that the so-called "feebleminded" "must generally be considered as socially unfit and their supply should if possible be eliminated from the human stock if we would maintain and raise the quality essential to the progress of our nation and our race." *Id.* at 15.

The attitudes and beliefs of the leaders of the eugenics movement led to restrictive policies towards persons with mental retardation including segregation, sterilization,[11] restrictive immigration and, among some leaders, consideration of euthanasia. These attitudes "so pervaded public and professional thinking that many of the views expressed during the period persist today." *Id.* at 16.

Throughout this period and beyond, the size and number of institutions for persons with mental retardation expanded rapidly. Although by 1930 the eugenics movement had been scientifically discredited and its leaders had largely recanted their views, institutions continued to expand. Between 1930 and 1970 the number of public institutions for persons with mental retardation increased from 77 to 190, while their populations grew from 68,035 to a 1967 peak of 194,650. *Id.* at 20.

The late 1960s and the 1970s saw not only the beginning of deinstitutionalization (the movement of residents of state institutions for mental retardation into communiy-based residential options) but also a series of exposés of the treatment of persons with disabilities in institutions. Litigation in many states successfully challenged the conditions of these institutions as unconstitutional. Persons with mental retardation experienced deplorable conditions, which are well documented in the litigation nationwide.

It is interesting to note that although the nation's overall institutional population continues to decline, Kentucky is one of the very few states with an actual increase in its institutional census in recent years. Nationally the institutional census has declined from 149,169 in 1977 to 109,619 in 1984 to 91,440 in 1988. That is an overall decrease of 16.6% nationally between 1984 and 1988. Only four states (one of which was Kentucky) showed increases in institutional census figures in the period of 1984-1988. D. Braddock et al., The State of the States in Developmental Disabilities 13 (1990).

Overall, the movement of people with mental retardation from institutional confinement to community residences is now firmly established. As one professional analysis has noted:

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[11] By 1926 twenty-three states had laws requiring sterilization of persons labeled as having mental retardation or making sterilization a prerequisite to their release from institutional confinement. *Id.* at 16. At one point even this Court approved such practice. *Buck v. Bell*, 274 U.S. 200 (1927). Indeed, even in 1942, in the case which struck down sterilization of criminals, *Skinner v. Oklahoma*, 316 U.S. 535 (1942), members of this Court continued to speak with approval, not repudiation, of the principle of eugenics as applied to persons with mental retardation:

> I also think the present plan to sterilize the individual in pursuit of a eugenic plan to eliminate from the race characteristics that are only vaguely identified and which in our present state of knowledge are uncertain as to transmissibility presents other constitutional questions of gravity. This Court has sustained such an experiment with respect to an imbecile, a person with definite and observable characteristics where the condition had persisted through three generations and afforded grounds for the belief that it was transmissible and would continue to manifest itself in generations to come. *Buck v. Bell.*

Skinner v. Oklahoma, supra, at 546 (Jackson, J., concurring).

> Undoubtedly a state may, after appropriate inquiry, constitutionally interfere with the personal liberty of the individual to prevent the transmission by inheritance of his socially injurious tendencies. *Buck v. Bell.*

Skinner v. Oklahoma, supra, at 544 (Stone, C.J., concurring).

> The issue of "institutions versus the community" which has dominated the field of developmental disabilities for nearly 20 years is yesterday's issue. That people with severe disabilities can be served in the community is no longer an unproven proposition. An increasing number of places across the country have found ways to support people with the most challenging needs in the community.

Taylor and Racino, *Community Living*, in Critical Issues in the Lives of People With Severe Disabilities 235 (1991).

The impact of involuntary institutionalization upon the institutionalized person's liberty interests is real, is tangible, and is felt by that person in a number of varied ways. For example, Alan Lessard of Tacoma, Washington, who was forced to live at an institutional setting, Rainer School, for forty-eight years until he moved to a community residence in 1990, stated his feelings as follows:

> No one should have to live in an institution. It's not home. Their home is right out here with everyone else.
>
> I went to Rainer School when I was a small boy because my mom and dad couldn't take care of me. I did carpentry there. I missed a lot.
>
> Now, I can take the bus by myself and I like that. Nobody comes with me.
>
> When I was at the institution, no one would let me do anything by myself. I don't feel so good that my friends are still there. I visit them and they visit me. They don't belong there.

V. Medgyesi, No More B.S.! A Realistic Survival Guide for Disability Rights Activists 29 (People First of Washington 1992) (copy provided to Librarian of Supreme Court Library).

Nonetheless, the basic purpose of Petitioner's lowering of its standard of proof for institutionalization of persons with mental retardation is to facilitate the involuntary confinement of persons with mental retardation in its state institutions. To justify such a facilitated process, Petitioner emphasizes alleged positive benefits of institutionalization, which would presumably include habilitation [12] and adequate health care. In fact, however, studies indicate that persons residing in state institutions for persons with mental retardation typically receive neither superior habilitation nor superior health care when compared to residents of less confining community residential facilities.

In regard to habilitative progress, researchers at the University of Minnesota summarized in 1989 the results of their investigation of existing research literature as follows:

> All eight experimental/contrast group studies reported statistically significant greater achievement in either overall adaptive behavior or in the basic self-care/domestic skill domain for those who moved to community living arrangements relative to those who remained in state institutions. . . .
>
> Among the longitudinal studies, 5 of the 10 reported statistically significant increases in overall adaptive behavior or in the basic self-care/domestic skill area after movement to the community. . . .
>
> Overall, 13 of the 18 studies summarized for this report noted statistically significant improvements in either overall adaptive behavior or in the basic self-care/domestic skill area. Seventeen of 18 studies showed at least a tendency toward improved adaptive

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[12] The liberty interests of an involuntarily institutionalized person with mental retardation require that the state provide habilitation consisting of, at least, minimally adequate or reasonable training to ensure safety and freedom from undue restraint. *Youngberg v. Romeo*, 457 U.S. 307 (1982).

> behavior associated with movement to the community. . . . Therefore, one must conclude that available research provides considerable support for the assertion that people who move from state institutions to small community living arrangements can be expected to experience increases in adaptive behavior skills.

Deinstitutionalization of Persons with Mental Retardation: The Impact on Daily Living Skills, Policy Research Brief, March 1989, at 2.

Similar studies question the presumption that institutionalized persons with mental retardation are "better off" in regard to health care:

> The available research does not clearly support one type of residential setting as superior to the others from a health and health care perspective. . . .
>
> The majority of studies noted positive health related outcome of individuals who were deinstitutionalized. In fact, one study found that many previously unrecognized medical conditions that were present while individuals lived in institutions were identified when they moved into the community.

Living in the Community: Persons with Mental Retardation and Allied Medical Conditions, Policy Research Brief, June 1990, at 2.

Moreover, despite Petitioner's protestation to the contrary,[13] use of psychotropic drugs[14] is widespread at institutions for persons with mental retardation, far more widespread, in fact, than at alternative residential settings. A 1989 survey of an entire institutional population of a large state revealed that 35.4% of residents at state institutions for persons with mental retardation were

given psychotropic drugs. Stone et al., *Prevalence and Prediction of Psychotropic Drug Use in California Developmental Centers*, 93 Am. J. on Mental Retardation 627 (1989). More revealing, and more alarming, are the figures from a 1988 study which show that fully 39.9% of persons with mental retardation living in institutions were administered psychotropic drugs, while only 24.8% of persons in community care facilities and 10.1% of persons living with relatives received such drugs. Jacobson, *Problem Behavior and Psychiatric Impairment Within a Developmentally Disabled Population III: Psychotropic Medication*, 9 Research in Developmental Disabilities 23, 30 (1988).

The debilitating effects of such drugs are described in the following typical account of a person (Pattie Burt) who formerly resided in an institution for persons labeled as having mental retardation:

> When I was on Thorazine I was getting them and throwing them down the toilet. . . . I didn't want to take them. I didn't like them. They just made me sleepy and tired. I couldn't study in school. I couldn't go to school and work or anything like that. I would just fall asleep. They told the doctor about me throwing them away so she put me on liquid medication and I had to stand in front of the attendant until it was all down. Then that stuff began to burn my tongue so they put me back on the pills.
>
> There were a lot of people on tranquilizers—maybe 50 percent of the patients. You could tell who was on it because they would be falling asleep. A lot of them were quiet. They couldn't do some of the things they were doing before.

R. Bogdan and S. Taylor, Inside Out: The Social Meaning of Mental Retardation 122 (1982).

The history of institutionalization of people with mental retardation is a history of failure to recognize their legitimate liberty interests. It is also a personal nightmare for many of those people, including some *amici* members. This Court should recognize that the courts below properly limited the state laws at issue.

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[13] "Mental retardation . . . rarely involves treatment through psychotropic medications." Brief for Petitioner at 32.

[14] Institutionalized persons possess a substantial liberty interest in avoiding the unwarranted imposition of psychotropic drugs. *Washington v. Harper*, 494 U.S. 210 (1990).

CONCLUSION

In the early 1980s a group of persons with mental retardation from Austria presented the following statement at the United Nations:

> We are people first and only secondly handicapped.
> We wish to speak for our rights and let other people know we exist.
> We want to explain to our fellow human beings that we can live and work in a community.
> We want to show that we have rights and responsibilities like other people.
> Our voice is new.
> We must first learn to speak.
> We ask everyone to learn to understand our voices.
> We need people who teach us to speak. People who believe in us.
> Mentally retarded persons do not want to live in terrible institutions.
> We want to live in the community.

Reprinted in Taylor and Searl, *supra* p. 18, at 25-26.

As is demonstrated ably by this statement and by the materials presented in this brief, people who are labeled as having mental retardation do not deserve to be treated differently, nor is there any basis for treating them differently, than other people when faced with the enormous invasion of liberty that occurs when involuntarily committed to an institution. The stigma, the invasive treatment, the lack of privacy documented here are ample reason for *amici* and our members to oppose a broadening of a state's powers in this arena.

Similarly, there is no need to give parents of adults with mental retardation a greater or even paramount interest in the commitment process. In spite of the good

intentions of the parents, there remains a significant need for external scrutiny of commitment decisions. Furthermore, this scrutiny must occur in a forum where the person alleged to have mental retardation has the opportunity to speak for himself or herself, just as *amici* have spoken to this Court through this brief.

For these reasons, *amici curiae* urge that this Court uphold the ruling of the U.S. Sixth Circuit Court of Appeals in this case.

Respectfully submitted,

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